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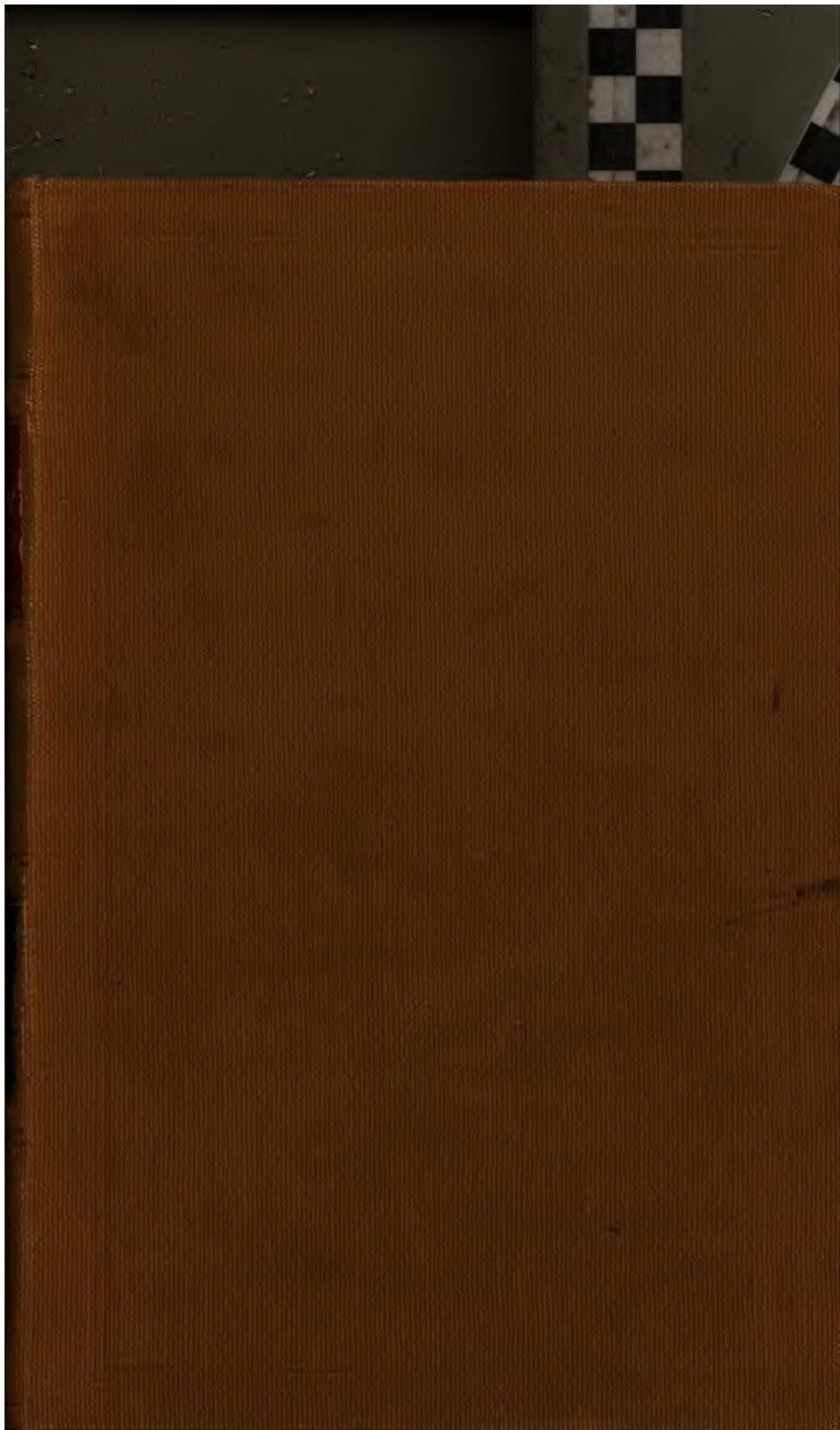
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**PROBATE LAW AND PRACTICE**

**WITH**  
**ANNOTATIONS AND FORMS**

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**UTAH, WASHINGTON, AND WYOMING.**

**BY**  
**W. S. CHURCH**  
**OF THE SAN FRANCISCO BAR**

**AUTHOR OF CHURCH ON HABEAS CORPUS, ANNOTATED SAN**  
**FRANCISCO CHARTER, ETC.**

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**SECOND EDITION**  
**IN THREE VOLUMES**

**VOLUME ONE**  
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## PREFACE TO SECOND EDITION

Since the first edition of this work was written, nearly twelve years ago, a great many statutory changes in probate law have been made and many important law-making decisions on probate law have been rendered, but these important changes and decisions are scattered through the many volumes of session laws, compiled statutes, and law reports, regardless of easy accessibility.

So numerous and important have been these statutory changes and law-making decisions that the author found, during the progress of the work, that a new, revised, and enlarged edition was necessary to present the law properly, as it is today, giving a synopsis of the points covered by the multitude of late decisions.

The tables of "Analogous and Identical Statutes" have been revised and brought down to date with references to the latest Annotated Codes and Statutes of the various states covered by this work.

W. S. CHURCH.

SAN FRANCISCO, July, 1920.

**INSCRIBED**

**TO**

**THE BENCH AND BAR**

**OF THE STATES AND TERRITORIES ENUMERATED ON THE TITLE  
PAGE OF THIS VOLUME AS A TRIBUTE TO THEIR LEARNING,  
RESEARCH, AND ARDUOUS LABORS IN EVOLVING A  
SYSTEMATIC METHOD OF PROCEDURE UNDER THE  
STATUTORY SYSTEM GOVERNING COURTS IN  
THE EXERCISE OF THEIR JURISDICTION  
OVER THE ESTATES OF DECEASED  
PERSONS**



## PREFACE TO FIRST EDITION

The plan of this work speaks for itself. It embraces the full and correct text of all sections of the California codes, bearing on probate law and practice. Probate law is a creature of the statute. Each point thereof is governed by the statute in force in the particular state, and, as little aid can be gained from text-writers, or from the decisions of other states where the statutes are not identical, or at least analogous, tables of "Analogous and Identical Statutes," so far as such statutes could be conveniently found, have been strewn throughout the volume to facilitate reference to the laws of other states than those of California.

Forms have been given for the various steps in probate proceedings, with "Explanatory Notes," suggesting what is necessary to fill the blanks left therein. Many of these forms are quite brief, but it is believed that each one contains all the requirements of the statute involved. Some of them have been in use, in California, for fifty years, long before the codes were adopted; but many of them are, in substance, the same as those promulgated by the Honorable Lucien Shaw, Presiding Justice of Department One of the Supreme Court of California, while he was a Superior Judge of Los Angeles. We have made free use of the forms approved by the learned justice, with the hope that they will simplify probate proceedings, decrease the volume of papers on file, make the record less cumbersome, and save the time and patience of judges on the bench,—a desideratum which seems to have been earnestly wished by the learned justice. There should not, however, be a "slavish adherence" to any of the forms given, but it will be convenient to follow the phraseology with such omissions and additions as the particular estate may require. Yet, at all times, and under all circumstances, the practitioner, before drawing a form, should inform himself of all requirements of the latest statute on the subject, and see that such requirements are incorporated therein. It has not been deemed necessary to give the form of affidavit, citation, order that notice be given, and the notice itself, in every proceeding, as the forms of such matters are very much alike, and to give them in each instance would lead to much useless repetition.

The form of the order, in any particular case, is suggestive of what the affidavit, petition, notice, and citation should contain. It is thought that the forms given in the following pages are full and complete enough for general purposes, and that they can be used, with slight modifications, in all the Pacific group of states. In particular or unusual cases, the additions or omissions suggested by the statute can easily be made. Courts have been named in the forms as "the court of the county of —, state of —," as being a designation likely to create the least confusion, and which can easily be changed where such is not the exact title. It will be noticed, too, that the words, "Dated," etc., fall below the judge's signature in some instances where neither the judge's signature nor a date is necessary to the validity of the paper. The words have simply been so placed to meet the exigencies of the type-set page. Nor does the law require the addresses of attorneys to be stated, in giving notices, etc., or that the file numbers of papers should be given, yet these matters should appear on the papers as a matter of convenience to all persons interested therein.

Many extended notes on various topics of probate law and practice have been interspersed throughout the volume, and include much of what the courts have said respecting the matters under consideration. A note follows each chapter, with few exceptions, discussing the law of the subject of the chapter. Cases on the construction and interpretation of wills, undue influence in the execution of wills, etc., are as numerous as the sands of the sea-shore. Hence, as "every will furnishes its own law," and, as the proof sufficient to establish undue influence must necessarily depend on the facts and circumstances of each particular case, no attempt has been made to give anything more than a mere general statement of the principles governing such matters. Their discussion, in detail, would of itself fill a large volume, and it may be found in almost any work on Wills. To avoid all misconception, it may be stated here, that when reference has been made, in the notes, to a "probate court," it is understood to be that branch or department of various courts, wherein probate proceedings are conducted. The power of a superior, district, or county court, exercising probate jurisdiction, is the same as it would be if such court were, in fact, a separate court. An effort has been made to give a key to the

whole field of probate law in the states named on the title page of this work. Most of the law devoted to a chapter will be found within its confines, and the index will afford a means of finding any incidental treatment of it elsewhere. Matters of like kind are brought together as closely as possible, and all of the material has been so arranged as to give one the best grip on probate law and practice that the author knows how to give.

The Hawaiian Islands have not been neglected. The common law of England was adopted there in 1893, and the Islands were a part of the United States on August 16, 1898. There is some good probate law in the former little kingdom, and Hawaiian reports have been cited as authority on a number of points.

The practitioner is cautioned to see that all notices required by statute or order of court have been served, posted, or published for the required length of time; and that affidavit of service, or of posting, or of publication of such notices is made and filed. Give notice of application, when necessary, for all orders of court, and see that everything is recorded which the law requires to be recorded.

It is hoped that this volume will fill a long-felt professional want, and that it will be as favorably received as the former works of the author.

SAN FRANCISCO, February, 1909.

WM. S. CHURCH.



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### **LAW OF ADOPTION.**

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| (2) Necessity of, to confer jurisdiction.        | (5) Rights of inheritance.  |
| (3) Relinquishment of custody and duty of judge. | (6) Divorce proceedings.  |
| (4) Exceptional conditions.                      | (7) Decree of adoption.   |
| (5) Orphan asylums and charitable institutions.  | (8) Contracts for compensation for support; actions thereon, etc. |
| (6) Parents living apart.                        | (9) Appeal.   |
| (7) Divorce proceedings.                         | 12. Attacking the order.  |
| (8) Illegitimate children.                       | (1) In general.   |
| 5. Examination of parties.                       | (2) Time for relief.  |
| 6. Order of adoption.                            | (3) Collateral attack.  |
| 7. Abandoned child.                              | (4) For fraud.  |
| 8. Indian children.                              | (5) Appeal.   |
| 9. Illegitimate children.                        | 13. What will not invalidate proceedings.                         |
| 10. Evidence of adoption.                        | 14. Adoption in another state.                                    |



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| 15. Inheritance.                 | 16. Specific performance.     |
| (1) Right of adopted child.      | 17. Hawaii.                   |
| (2) Illegitimate children.       | 18. Adoption of adults.       |
| (3) Agreement of adoption.       | 19. Agreement to adopt.       |
| (4) Rights of adopting parent.   | 20. Welfare of child.         |
| (5) Children of adopting parent. | 21. Appeal and habeas corpus. |

### §1. Of child.

Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter.—*Kerr's Cyc. Civ. Code*, § 221.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 447.  
 Arizona\*—Revised Statutes of 1913, paragraph 1186.  
 Colorado—Mills's Statutes of 1912, section 635.  
 Idaho\*—Compiled Statutes of 1919, section 4682.  
 Kansas—General Statutes of 1915, section 6362.  
 Montana—Revised Codes of 1907, section 3761.  
 Nevada—Revised Laws of 1912, section 5825.  
 New Mexico—Statutes of 1915, section 13; Laws of 1917, chapter 85, pages 238, 240.  
 North Dakota\*—Compiled Laws of 1913, section 4441.  
 Oklahoma\*—Revised Laws of 1910, section 4385.  
 Oregon—Lord's Oregon Laws, section 7083; as amended by Laws of 1911, chapter 11, page 29.  
 South Dakota\*—Compiled Laws of 1913, section 2622.  
 Utah\*—Compiled Laws of 1907, section 1.  
 Washington—Remington's 1915 Code, section 1696.  
 Wyoming—Compiled Statutes of 1910, section 3952.

### §2. Who may adopt.

The person adopting a child must be at least ten years older than the person adopted.—*Kerr's Cyc. Civ. Code*, § 222.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 447.  
 Arizona\*—Revised Statutes of 1913, paragraph 1187.  
 Colorado—Mills's Statutes of 1912, section 635.  
 Hawaii—Laws of 1915, Act 47, page 49.  
 Idaho—Compiled Statutes of 1919, section 4683.  
 Kansas—General Statutes of 1915, section 6362.  
 Montana\*—Revised Codes of 1907, section 3762.  
 Nevada—Revised Laws of 1912, section 5825.

**New Mexico**—Statutes of 1915, section 13; Laws of 1917, chapter 85, pages 238, 240.  
**North Dakota\***—Compiled Laws of 1913, section 4442.  
**Oklahoma\***—Revised Laws of 1910, section 4386.  
**Oregon**—Lord's Oregon Laws, section 7083; as amended by Laws of 1911, chapter 11, page 29.  
**South Dakota\***—Compiled Laws of 1913, section 2623.  
**Utah\***—Compiled Laws of 1907, section 2.  
**Washington**—Remington's 1915 Code, section 1696.  
**Wyoming**—Compiled Statutes of 1910, section 3952.

### § 3. Consent to adoption, in general.

A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent.—*Kerr's Cyc. Civ. Code*, § 223.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

**Alaska**—Compiled Laws of 1913, section 447.  
**Arizona**—Revised Statutes of 1913, paragraphs 1189, 1190.  
**Colorado**—Mills's Statutes of 1912, sections 635, 636.  
**Idaho\***—Compiled Statutes of 1919, section 4684.  
**Kansas**—General Statutes of 1915, section 6362.  
**Montana\***—Revised Codes of 1907, section 3763.  
**Nevada\***—Revised Laws of 1912, section 5827.  
**New Mexico**—Statutes of 1915, section 15; Laws of 1917, chapter 85, pages 238, 240.  
**North Dakota\***—Compiled Laws of 1913, section 4443.  
**Oklahoma\***—Revised Laws of 1910, section 4387.  
**Oregon**—Lord's Oregon Laws, section 7083; as amended by Laws of 1911, chapter 11, page 29.  
**South Dakota\***—Compiled Laws of 1913, section 2624.  
**Utah\***—Compiled Laws of 1907, section 3.  
**Washington**—Remington's 1915 Code, sections 1696, 1697.  
**Wyoming**—Compiled Statutes of 1910, section 3953.

### § 4. Same. Adoption of orphans and abandoned children.

A legitimate child cannot be adopted without the consent of its parents if living, nor an illegitimate child without the consent of its mother if living, except that consent is not necessary in the following cases, to wit:

1. From a father or mother if deprived of civil rights.
2. From a father or mother adjudged guilty of adultery or cruelty and for either cause divorced.

3. **FATHER OR MOTHER DEPRIVED OF CONTROL OF CHILD.**—From a father or mother who has been judicially deprived of the custody and control of such child on the ground of abandonment, cruelty, neglect or habitual intemperance, either by order of the juvenile court declaring said child to be free from the custody and control of its parents as provided in the juvenile court law of the state of California, approved June 5, 1915, and any act or acts superseding or amending same, or by order of the juvenile court of the county, where such child was left in the care and custody of another by its parent or parents, without any provisions for its support, for the period of one year, determining such child to be an abandoned child as defined in said juvenile court law; provided, however, that said juvenile court shall never make such order of abandonment without first giving notice of said abandonment proceeding by personal service of citation or other court process on the parent or parents or person having the custody of such child residing within the state, if their residence is known, and also such other or further notice to said parent or parents or person having the custody of such child, or other person or persons as the court may require, or by order of any other court of competent jurisdiction.

4. **FATHER OR MOTHER DECLARED INSANE.**—From a father or mother who has been declared either feeble-minded or insane by the state commission in lunacy or by three competent persons appointed by said commission; provided, that if so declared insane, said father or mother shall have subsequently been determined to be incurably insane by the superior court of the county where he or she resides.

**DESERTED CHILD.**—From a father or mother of any child

deserted by its parents without provision for their identification.

**CHILD RELINQUISHED FOR PURPOSE OF ADOPTION.**—From a father or mother of any child relinquished by its parent or parents for the purpose of adoption expressed in writing signed and acknowledged by such parent or parents before an officer authorized to take acknowledgments, or signed by such parent or parents before two subscribing witnesses and acknowledged by such parent or parents before the secretary of any organization or society engaged in the work of placing dependent or deserted children into homes in this state, which organization or society has obtained a permit therefor, duly executed in writing, from the state board of charities and corrections, and when a copy of this relinquishment shall have been filed with the state board of charities and corrections prior to the commencement of any adoption proceedings affecting such child.

**CHILD IN ORPHAN ASYLUM.**—Any child, the consent of whose parents is not necessary for its adoption within the meaning of this section maintained by or in the custody of any orphan asylum within this state, any charitable organization or society receiving state aid or receiving commitments from the juvenile court, may be adopted with the consent of the president of such orphan asylum, charitable organization or society, or with the consent of such officer as may be authorized by the directors or managers of such asylum, organization or society to consent to adoption in such cases. Any orphan child for whose support no provision has been made by any person for a period of one year, but who has been maintained during said year, by or in the custody of any orphan asylum within this state, any charitable organization or society receiving state aid or receiving commitments from the juvenile court may be adopted with the consent of the president of such orphan asylum, charitable organization or society or with the consent of such officer

as may be authorized by the directors or managers of such asylum, organization or society to consent to adoption in such cases.—*Kerr's Cyc. Civ. Code*, § 224.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska—Compiled Laws of 1913, section 448.
- Arizona—Revised Statutes of 1913, paragraph 1189.
- Colorado—Mills's Statutes of 1912, sections 636, 637, 744.
- Idaho—Compiled Statutes of 1919, section 4685.
- Kansas—General Statutes of 1915, section 6368.
- Montana—Revised Codes of 1907, sections 3764, 3771, and section 3772, as amended by Laws of 1909, chapter 62, page 68. See Supp. of 1915, page 537, Power to Place orphans in homes for adoption. See Laws of 1911, chapter 133, page 376.
- Nevada—Revised Laws of 1912, sections 5828, 5831.
- New Mexico—Statutes of 1915, sections 16, 17, 21.
- North Dakota—Compiled Laws of 1913, section 4444.
- Oklahoma—Revised Laws of 1910, sections 4388, 4394.
- Oregon—Lord's Oregon Laws, sections 7084, 7085.
- South Dakota—Compiled Laws of 1913, section 2625.
- Utah—Compiled Laws of 1907, sections 4, 11.
- Washington—Remington's 1915 Code, sections 1696, 1700.
- Wyoming—Compiled Statutes of 1910, sections 3114, 3960.

#### § 5. Consent of child.

The consent of a child, if over the age of twelve years, is necessary to its adoption.—*Kerr's Cyc. Civ. Code*, § 225.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 451.
- Arizona—Revised Statutes of 1913, paragraph 1194.
- Colorado—Mills's Statutes of 1912, section 635.
- Hawaii—Laws of 1915, Act 47, page 49.
- Idaho\*—Compiled Statutes of 1919, section 4686.
- Kansas—General Statutes of 1915, section 6362.
- Montana\*—Revised Codes of 1907, section 3765.
- Nevada—Revised Laws of 1912, section 5828.
- New Mexico—Statutes of 1915, section 18.
- North Dakota—Compiled Laws of 1913, section 4445.
- Oklahoma\*—Revised Laws of 1910, section 4389.
- Oregon—Lord's Oregon Laws, section 7087.
- South Dakota\*—Compiled Laws of 1913, volume II, page 16, section 132.

Utah\*—Compiled Laws of 1907, section 5.

Washington—Remington's 1915 Code, section 1696.

Wyoming—Compiled Statutes of 1910, sections 3114, 3953.

**§ 6. Proceedings on adoption.**

Any person desiring to adopt a child may, for that purpose, petition the superior court of the county in which the petitioner resides. The person adopting a child, and the child adopted, and the other persons, if within or residents of said county, whose consent is necessary, must appear before the court, and the necessary consent must thereupon be signed and an agreement executed by the person adopting, to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. If the persons whose consent is necessary are not within or are not residents of said county, then their written consent, duly proved or acknowledged, according to sections eleven hundred and eighty-two and eleven hundred and eighty-three, must be filed in said superior court at the time of the application for adoption.—*Kerr's Cyc. Civ. Code*, § 226.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 447.

Arizona—Revised Statutes of 1913, paragraph 1192.

Colorado—Mills's Statutes of 1912, section 637.

Idaho—Compiled Statutes of 1919, section 4687.

Kansas—General Statutes of 1915, section 6362.

Montana—Revised Codes of 1907, section 3766.

Nevada—Revised Laws of 1912, section 5831.

New Mexico—Statutes of 1915, section 19.

North Dakota—Compiled Laws of 1913, section 4446.

Oklahoma—Revised Laws of 1910, sections 4390-4393.

Oregon—Lord's Oregon Laws, section 7083.

South Dakota—Compiled Laws of 1913, volume II, page 16, sections 133, 134.

Utah—Compiled Laws of 1907, section 6.

Washington—Remington's 1915 Code, section 1696.

Wyoming—Compiled Statutes of 1910, sections 3953, 3959.

**§ 7. Form. Petition for leave to adopt a minor.**

[Title of court.]

[Title of matter.]

(Department No. —.

) [Title of form.]

To the Honorable the —<sup>1</sup> Court of the County<sup>2</sup> of  
—, State of —.

Your petitioners, — and —, respectfully represent  
as follows:

That they desire to adopt a minor child, namely, —,  
as their own child; and that said child is — (—) years  
of age;<sup>3</sup>

That your petitioners are married, and are husband  
and wife; and that they are both residents of —;<sup>4</sup>

That the parents of said minor child are — and  
—,<sup>5</sup> who consent that such adoption be made by peti-  
tioners;

That consent to such adoption is in writing, signed by  
all parties whose consent is required by law, and is on file  
herein;

That the welfare of such child will be subserved, and  
its best interests promoted, by such adoption.

Your petitioners therefore pray for an order of this  
court that said petitioners have adopted said minor child,  
and that henceforth such child shall be regarded and  
treated in all respects as the child of petitioners, includ-  
ing the right of support, protection, and inheritance.

Dated —, 9—.

—, Petitioner.

—, Petitioner.

**Explanatory notes.**—<sup>1</sup> Title of court. <sup>2</sup> Or, City and County. <sup>3</sup> If  
over a certain age prescribed by statute, when consent of the child is  
necessary, say here, "and consents to such adoption by petitioners."  
<sup>4</sup> County in which order of adoption is made. <sup>5</sup> In cases where consent  
is not necessary, or can not be given, say that —, the father, or —,  
the mother, of said child, according to the fact, is dead, or insane, etc.

**§ 8. Form. Consent to adoption.**

[Title of court.]

[Title of matter.]

{ Department No. —.  
[Title of form.] }

A petition having been filed in the above-entitled court for leave to adopt —, a minor child of — and —, the undersigned hereby consent to the said adoption in accordance with such petition.

\_\_\_\_<sup>1</sup>  
\_\_\_\_<sup>2</sup>  
\_\_\_\_<sup>3</sup>  
\_\_\_\_<sup>4</sup>  
\_\_\_\_<sup>5</sup>

**Explanatory notes.**—1 Name of father. 2 Name of mother. 3 Name of guardian. 4 Name of said minor child, if over twelve years of age. 5 Name of husband or wife adopting. When the consent of the husband or wife of the person adopting is required by statute, as in California, the consent should also be signed by such husband or wife.

**§ 9. Form. Agreement to adopt.**

[Title of court.]

[Title of matter.]

{ Department No. —.  
[Title of form.] }

A petition having been filed in the above-entitled court for leave to adopt —, a minor child of — and —, and —,<sup>1</sup> —,<sup>2</sup> —,<sup>3</sup> —,<sup>4</sup> and —,<sup>5</sup> having filed in the said court their consent in writing to such adoption,—

Now, therefore, In consideration of the filing of such consent as required by law, and of the entry of an order of said court permitting said adoption to be made as prayed for in said petition, the undersigned, the petitioners,<sup>6</sup> who are residents of the county <sup>7</sup> in which such order of adoption is made, hereby agree with said minor, and with said other persons, whose consent has been filed as aforesaid, that the said — shall be adopted, and is now adopted, as our own child, and that such minor child shall be treated in all respects as our own lawful child should be treated, including the right of support, protection, and inheritance.



In witness whereof, We have hereunto set our hands  
and seals this day — day of —, 19—. — [Seal]  
— [Seal]

**Explanatory notes.**—1 Father. 2 Mother. 3 Guardian. 4 Minor child.  
5 Husband or wife of person adopting. 6 If there is but one petitioner,  
make the appropriate change in nouns and pronouns. 7 Or, city and  
county.

#### § 10. Judge's order of adoption.

The court must examine all persons appearing before it pursuant to the last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, it must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting. The petition, agreement, consent, and order must be filed and registered in the office of the county clerk in the same manner as papers in other special proceedings.—*Kerr's Cyc. Civ. Code*, § 227.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

**Alaska**—Compiled Laws of 1913, section 452.  
**Arizona**—Revised Statutes of 1913, paragraph 1193.  
**Colorado**—Mills's Statutes of 1912, section 637.  
**Hawaii**—Laws of 1915, Act 47, page 49.  
**Idaho**—Compiled Statutes of 1919, section 4688.  
**Kansas**—General Statutes of 1915, section 6362.  
**Montana**—Revised Codes of 1907, section 3767.  
**Nevada**—Revised Laws of 1912, section 5831.  
**New Mexico**—Statutes of 1915, section 22.  
**North Dakota**—Compiled Laws of 1913, section 4447.  
**Oklahoma**—Revised Laws of 1910, sections 4393, 4394.  
**Oregon**—Lord's Oregon Laws, section 7088.  
**South Dakota**—Compiled Laws of 1913, section 2628.  
**Utah**—Compiled Laws of 1907, section 7.  
**Washington**—Remington's 1915 Code, sections 1696, 1698.  
**Wyoming**—Compiled Statutes of 1910, section 3954.

## § 11. Form. Order of adoption.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

It being shown to this court, in the above-entitled matter, that — and —, on the — day of —, 19—, filed a petition in said court for leave to adopt —, a minor child of — and —; that said minor child, —, is over the age of —<sup>2</sup> years, and that his consent, in writing to his adoption by said petitioners, has been signed before me and filed herein; that the said — is the father of said minor child; that the said — is the mother of said minor child; that — is the guardian of said minor child; that the consent of the said father, mother, and guardian of said minor child, to its adoption by said petitioners, has been signed before me and filed herein; and that said petitioners have filed herein an agreement properly signed, before me, with said minor child, and with each person whose consent has been filed herein, that the said minor child shall be adopted by the said petitioner, and treated in all respects as their own lawful child should be treated, including the right of inheritance; and the said matter now coming regularly on for hearing,<sup>3</sup> the court proceeds to an examination of the case, and finds that said petitioners, and the said minor child, and all persons whose consent is necessary, have each appeared herein, and were examined as provided by law; that each of said petitioners resides in this county;<sup>4</sup> and that the interests of —, the said minor child, will be promoted by such adoption; —

It is therefore ordered, adjudged, and decreed, That the said petitioners, — and —, adopt the said minor child; that henceforth the said minor child shall be treated by them in all respects as their own lawful child should be treated, including the right of inheritance; and that said petitioners and the said minor child shall here-

after bear towards each other the relation of parent and child.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 Twelve years, or other age prescribed by statute. 3 If the matter has been continued, say, "and the said matter having been by the court regularly postponed to the present time." 4 County in which order of adoption is made.

### § 12. Effect of adoption.

A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.—*Kerr's Cyc. Civ. Code*, § 228.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 453.
- Arizona\*—Revised Statutes of 1913, paragraph 1195.
- Colorado—Mills's Statutes of 1912, section 638.
- Hawaii—Revised Laws of 1915, section 2994.
- Idaho\*—Compiled Statutes of 1919, section 4689.
- Kansas—General Statutes of 1915, sections 6362, 6363.
- Montana\*—Revised Codes of 1907, section 3768.
- Nevada—Revised Laws of 1912, section 5830.
- New Mexico—Statutes of 1915, section 24.
- North Dakota—Compiled Laws of 1913, sections 4447, 4448.
- Oklahoma—Revised Laws of 1910, sections 4395, 4396, 4397.
- Oregon—Lord's Oregon Laws, sections 7089, 7095.
- South Dakota\*—Compiled Laws of 1913, section 2629.
- Utah\*—Compiled Laws of 1907, section 8.
- Washington—Remington's 1915 Code, section 1699.
- Wyoming—Compiled Statutes of 1910, sections 3955, 3964, 3965.

### § 13. Same. On parents.

The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it.—*Kerr's Cyc. Civ. Code*, § 229.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 454.
- Arizona\*—Revised Statutes of 1913, paragraph 1196.

Colorado—Mills's Statutes of 1912, section 638.  
 Idaho\*—Compiled Statutes of 1919, section 4690.  
 Montana\*—Revised Codes of 1907, section 3769.  
 Nevada—Revised Laws of 1912, section 5830.  
 New Mexico—Statutes of 1915, section 25.  
 North Dakota—Compiled Laws of 1913, section 4449.  
 Oklahoma—Revised Laws of 1910, section 4398.  
 Oregon—Lord's Oregon Laws, section 7090.  
 South Dakota\*—Compiled Laws of 1913, section 2630.  
 Utah\*—Compiled Laws of 1907, section 9.  
 Washington—Remington's 1915 Code, section 1699.  
 Wyoming—Compiled Statutes of 1910, section 3955.

#### § 14. Of illegitimate child.

The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.—*Kerr's Cyc. Civ. Code*, § 230.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1198.  
 Idaho—Compiled Statutes of 1919, section 4691.  
 Montana\*—Revised Codes of 1907, section 3770.  
 Nevada—Revised Laws of 1912, section 5833.  
 New Mexico—Statutes of 1915, section 17.  
 North Dakota\*—Compiled Laws of 1913, section 4450.  
 Oklahoma—Revised Laws of 1910, section 4399; Laws of 1910-11, chapter 73, page 169.  
 Oregon—Laws of 1915, chapter 31, page 42.  
 South Dakota\*—Compiled Laws of 1913, section 2631.  
 Utah\*—Compiled Laws of 1907, section 10.

## LAW OF ADOPTION.

- |  |   |
|--|---|
| 1. Nature of proceeding.                         | (8) Divorce proceedings.  |
| 2. Essentials of adoption.                       | (7) Decree of adoption.   |
| 3. Who may adopt.                                | (8) Contracts for compensation for support; actions thereon, etc. |
| 4. Consent to adoption.                          | (9) Appeal.   |
| (1) In general.                                  | 12. Attacking the order.  |
| (2) Necessity of, to confer jurisdiction.        | (1) In general.   |
| (3) Relinquishment of custody and duty of judge. | (2) Time for relief.  |
| (4) Exceptional conditions.                      | (3) Collateral attack.  |
| (5) Orphan asylums and charitable institutions.  | (4) For fraud.  |
| (6) Parents living apart.                        | (5) Appeal.   |
| (7) Divorce proceedings.                         | 13. What will not invalidate proceedings.                         |
| (8) Illegitimate children.                       | 14. Adoption in another state.                                    |
| 5. Examination of parties.                       | 15. Inheritance.  |
| 6. Order of adoption.                            | (1) Right of adopted child.                                       |
| 7. Abandoned child.                              | (2) Illegitimate children.  |
| 8. Indian children.                              | (3) Agreement of adoption.  |
| 9. Illegitimate children.                        | (4) Rights of adopting parent.                                    |
| 10. Evidence of adoption.                        | (5) Children of adopting parent.                                  |
| 11. Effect of adoption.                          | 16. Specific performance.   |
| (1) In general.                                  | 17. Hawaii.   |
| (2) As to taking name.                           | 18. Adoption of adults.   |
| (3) Upon rights of parents.                      | 19. Agreement to adopt.   |
| (4) As to guardianship.                          | 20. Welfare of child.   |
| (5) Rights of inheritance.                       | 21. Appeal and habeas corpus.                                     |

1. Nature of proceeding.—Adoption was unknown to the common law, and, independently of statute, there is no such thing as the adoption of an heir. Such a proceeding is purely statutory.—*Long v. Dufur*, 58 Or. 162, 113 Pac. 59; *Matter of Cozza*, 163 Cal. 514, Ann. Cas. 1914A, 214, 126 Pac. 161; *Darling's Estate*, 173 Cal. 221, 159 Pac. 606; and a strict compliance with the statute is jurisdictional.—*Sharon's Estate* (Cal.), 177 Pac. 283. It is a special power, to be strictly construed.—*Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641, 642; *Ex parte Clark*, 87 Cal. 638, 25 Pac. 967; *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 3 L. R. A. 620, 20 Pac. 842; *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23. The adoption of children is purely a matter of statute, pertaining to the legislature, with which a judge or a court has nothing to do, unless the power is conferred upon them by statute. The matter of adoption belongs to the legislative, and not to the judicial, department of the government.—*In re Stevens*, 83 Cal. 322, 331, 17 Am. St. Rep. 252, 23 Pac. 379. As the legislature has full power over this matter, it may invest any person, or officer, or court, with the power of receiving, witnessing, and declaring the adoption. It may prescribe what that ceremony shall be, and before whom it shall be celebrated. It may make the ceremony so simple that its celebration requires only the consent in writing of the parents of the child, and the acceptance of such consent by the person desiring to adopt, and the filing of such paper with a public officer. The legislative power over the subject of adoption is not an interference with judicial power.

—In *re Stevens*, 83 Cal. 322, 331, 17 Am. St. Rep. 252, 23 Pac. 379. An adoption proceeding is one of contract between both parties whose consent is required.—In *re Johnson*, 98 Cal. 531, 552, 21 L. R. A. 380, 33 Pac. 460. The term "legal adoption," found in the workmen's compensation act of Kansas, means adoption according to the statute governing that subject; it does not extend to a child taken into a family and treated as natural offspring under an agreement to adopt that was never performed.—*Ellis v. Coal Co.*, 100 Kan. 187, 163 Pac. 654. The courts of one state can not take judicial notice of the adoption laws of other states, and the statutes being in derogation of the common law must be strictly construed.—*Long v. Dufur*, 58 Or. 162, 113 Pac. 59.

## REFERENCES.

Proceedings on adoption. See *Kerr's Cal. Cyc. Civ. Code*, § 226, and notes. Conflict of laws as to adoption. See note 65 L. R. A. 177-187.

2. **Essentials of adoption.**—It is necessary for the record to show that the person adopting a child is a resident of the county in which the order of adoption is made.—*Ex parte Clark*, 87 Cal. 638, 640, 25 Pac. 967. The jurisdiction, both as to subject-matter and the person, must affirmatively appear.—*Ex parte Clark*, 87 Cal. 638, 640, 25 Pac. 967. A petition for adoption can not be maintained by a non-resident of the state.—*Knight v. Gallaway*, 42 Wash. 413, 85 Pac. 21. Until 1875, when a law was passed giving jurisdiction over adoption to the district court a person could be validly adopted in Washington only by act of the legislature.—*Wall v. McEnnery's Estate* (Wash.), 178 Pac. 631. In order that a child may be validly adopted, the approval of the probate judge of the community must first be obtained in open court.—*Malaney v. Cameron*, 98 Kan. 620, 159, Pac. 19, and see same case, 99 Kan. 70, 424, 677. There was no adoption at common law; hence, there can be no parol adoption.—*Wall v. McEnnery's Estate* (Wash.), 178 Pac. 631. He who claims that the act of adoption has been accomplished must show that every essential requirement of the statute has been strictly complied with.—*In re Sharon's Estate* (Cal), 177 Pac. 283.

## REFERENCES.

Adoption of adult under statute providing for adoption of child.—See note 12 L. R. A. (N. S.) 884, 885.

3. **Who may adopt.**—Adoption may be made by persons other than the parent.—*In re Jessup*, 81 Cal. 408, 446, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028. A wife has precisely the same right to adopt a child as the husband, and there seems to be no reason why both may not unite in an application for the adoption of a child as the child of both, or why, in such a case, the order of adoption should not declare that the child shall henceforth be treated and regarded as the child of both spouses.—*In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

#### 4. Consent to adoption.

(1) *In general.*—Consent lies at the foundation of statutes of adoption, and, when it is required to be given and submitted, the court can not take jurisdiction of the subject-matter without it. Hence if the parents are living, and do not belong to the excepted classes, their consent must be given, and is a prerequisite to jurisdiction.—*Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 3 L. R. A. 620, 20 Pac. 842. In adoption proceedings, where no guardian is appointed, it becomes necessary for the parents to consent to such adoption.—*State v. Wheeler*, 43 Wash. 183, 86 Pac. 394, 396. A mother's consent is not necessary, where the adoption is by the father, and especially where such adoption is the result of his conduct toward the child, and such consent does not depend on any formal proceeding.—*In re Jessup*, 81 Cal. 408, 446, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028.

(2) *Necessity of, to confer jurisdiction.*—Under the California statutes, consent is made absolutely essential to confer jurisdiction on the superior court to make an order of adoption, unless the conditions or exceptions exist especially provided by the statute itself and which render such consent of the parents unnecessary. Unless such consent is given, or for the exceptional causes expressly enumerated is dispensed with, the court has no discretion in the matter.—*Matter of Cozza*, 163 Cal. 514, Ann. Cas. 1914A, 214, 126 Pac. 161; *Petition of Kelly*, 25 Cal. App. 651, 657, 145, Pac. 156. Parental consent is absolutely essential to confer jurisdiction to make an order of adoption subject to the conditions provided by the statute. When the child has come under the control of the juvenile court, that fact can be considered only for the purpose of determining desertion or abandonment by the parents. The court has no discretion to make an order of adoption regardless of the consent or wishes of the parent and merely that the interest of the child will be promoted thereby.—*In re Cozza*, 163 Cal. 514, Ann. Cas. 1914A, 214, 126 Pac. 161.

(3) *Relinquishment of custody and duty of judge.*—When a parent makes application to the probate judge to relinquish all right to his or her child, it is, among other things, the duty of the probate judge to make inquiry as to the right of the parent making the application to make such relinquishment; and if, upon such inquiry, it should be ascertained that the other parent is still living, and still possesses a right to its care, custody, or control, it would be the duty of the judge to refuse to approve such adoption, unless the written consent of such absent parent is obtained and filed. On the other hand, if the judge should find that the child had another parent living, and also that that parent had relinquished his or her right to the care, custody, or control of the child, it would not be necessary to have his or her consent. "The parent" referred to in such a proceeding is a parent who still possesses some right in or to the custody over and control of the

child which he or she can relinquish.—*Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23, 26.

(4) **Exceptional conditions.**—As the act of adoption is to sever absolutely the legal relation between the parents and child, to destroy their reciprocal relations, and create entirely new ones between the adopted parents and the child, the law, recognizing the natural and sacred rights of natural parents to their children, will permit this to be done only with the consent of the parents, unless under exceptional conditions, which it itself prescribes, such consent is declared unnecessary.—*Matter of Cozza*, 163 Cal. 514, Ann. Cas. 1914A, 214, 126 Pac. 161. The legal parentage of a child is not and can not be lawfully changed under the laws as a matter of the court's discretion in so far as the consent of the minor's parents are concerned, and until the consent of both living parents is given in the manner provided by the statute or this consent is shown to be unnecessary because of the existence of the conditions specified in the statute, the court has no discretion to act in the matter at all.—*In re Lease*, 99 Wash. 413, 169 Pac. 816, 817. A probate judge has no power to make an order of adoption of children without the consent of the parents, unless it appears in the record before the court that the case comes within some of the exceptions mentioned in the statute; if the case does not come within such exception, the order of adoption is not binding upon the parents.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. Though the statute says that the consent of the parents, to the adoption of their children, is unnecessary where they have been judicially deprived of the custody of their children on account of neglect, this simply means cases in which they have been finally and permanently deprived of such custody by a final, absolute, and unconditional judgment of the court; a mere temporary order is not such a judgment.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. The juvenile department of the superior court is not the department charged with adoption proceedings, but it is a branch of the same court, and the knowledge of the judge of that department must be construed to be at least notice to the other department of the fact that an adoption case in the matter of a dependent child under the control of the juvenile department, and it was not necessary for that department to give its consent to the adoption of such child.—*In re Rising*, 104 Wash. 581, 177 Pac. 351, 353.

(5) **Orphan asylums and charitable institutions.**—An orphan child, who has been in an orphan asylum for a year, and supported at its expense, can not be legally adopted by a husband and wife, under the decree of a superior court, without the consent of the managers of the asylum, given in the same manner as parents are authorized to consent to the adoption of their children. *Ex parte Chambers*, 80 Cal. 216, 219, 22 Pac. 138; but where there is no adoption, because of a failure to adopt according to law, the objection may be obviated by proceeding at once to have the child adopted in the mode prescribed by statute.—

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*Ex parte Chambers*, 80 Cal. 216, 219, 22 Pac. 138. A benevolent or charitable society does not have the power, under the statute of Idaho, to consent to the adoption of a child, in its custody, which has been committed to it by the probate court, and which was removed from the custody of its parents without their consent.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364.

(6) *Parents living apart.*—The consent of a husband living separate and apart from his wife and residing in another state is not required for the adoption of an infant by the wife.—*In re Rising*, 104 Wash. 581, 177 Pac. 351, 352. The statute which provides that if the parents of a minor are living apart the consent of both is not required for its adoption, but such consent may be given by the parent having the care, must be strictly construed, and the custody and control of the parent consenting to the adoption must be of an absolute and unconditional nature to extinguish the right of the other parent, and where the latter was given the right to visit a child at all reasonable times, by the decree of divorce, such absolute and unconditional nature is not shown, and the necessity for his consent is not extinguished.—*In re Lease*, 99 Wash. 413, 169 Pac. 816, 818.

(7) *Divorce proceedings.*—Where a father has been divorced from the mother on the ground of his adultery, his consent to the order of adoption is rendered unnecessary by the express provisions of the code.—*In re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407. Where a divorce has been granted for cruelty, and the custody of a child is awarded absolutely to the innocent party, the consent of the guilty one is not required in adoption proceedings under the provisions of section 224 of the Civil Code; however, this section does not interfere with the orders of the court in divorce proceedings concerning the custody of the children, nor does it dispense with the consent of the parent to whom the custody of the child was awarded in the divorce proceeding.—*Matter of Cozza*, 163 Cal. 514, Ann. Cas. 1914A, 214, 126 Pac. 161. If a wife has secured a divorce from her husband, and she has been given the custody of the children, the husband, in subsequent proceedings for the adoption of one of the children, is not entitled to notice of such proceedings; his consent is not required.—*In re Beers*, 78 Wash. 576, 579, 139 Pac. 629.

(8) *Illegitimate children.*—A writing by the mother of a child born out of lawful wedlock, voluntarily giving up all claim to her child and delivering it to a foundling home is sufficient evidence of her consent to its subsequent adoption by another, although the name of the latter was not given in the writing.—*In re Rising*, 104 Wash. 581, 177 Pac. 351, 353. The mother of an illegitimate child who voluntarily, in writing, gave up all claim to such child in delivering it to a foundling's home, cuts off her rights in subsequent adoption proceedings, although the name of the person to whom possession of the child was given was not mentioned in such writing, and her consent to such subsequent

adoption was not required.—*In re Rising*, 104 Wash. 581, 177 Pac. 351, 353. It is a sufficient written consent, by the parent, to the adoption of an illegitimate child, under the Code of Washington, that the mother, within a few days after the birth of the child, executed before witnesses, and gave to the petitioner an instrument in writing containing the following words: "I hereby turn over my right and title of my baby girl, born November 23, 1910, to" the petitioner, naming her.—*In re Potter*, 85 Wash. 617, 149 Pac. 23. One claiming to have been adopted by a married man, since deceased, under the law prevailing in 1892, must prove that the man's wife gave her written consent in the presence of the judge, that the mother of the claimant gave likewise her written consent, or else abandoned him, and that the decedent agreed in writing, in the presence of the judge of the superior court of the county of the decedent's residence, that the claimant be adopted by him and treated as his own child; that claimant, if 13 years of age at the time, consented in writing to be adopted, and finally, that the judge examined into all the facts and circumstances of the case and satisfied himself of the propriety of the adoption before signing the order.—*In re Sharon's Estate (Cal.)*, 177 Pac. 283.

#### REFERENCES.

Constitutionality of statute permitting adoption of child without consent of parents. See note 18 L. R. A. (N. S.) 926, 927. Validity of adoption without consent of natural parents. See note 30 L. R. A. (N. S.) 146.

5. *Examination of parties.*—The only object of a statute in directing the judge of a court to examine the parties who are required to appear before him in adoption proceedings is, that he may satisfy himself that the parties whose consent is required do consent, fully and freely, to the making of such contract, and that the adoption contemplated by the contract will be for the best interests of the child adopted.—*In re Johnson*, 98 Cal. 531, 538, 21 L. R. A. 380, 33 Pac. 460. In determining whether leave to adopt a child should be granted by the court, the welfare of the child is the primary, if not the sole, consideration.—*Knight v. Gallaway*, 42 Wash. 413, 85 Pac. 21. In order that the judge may thus satisfy himself that a child over the age of twelve years, or a wife whose consent is necessary, does freely consent to the adoption, the judge is required to examine the parties separately; but the examination of a child whose consent to the contract is unnecessary, and who is of such tender years that it is incapable of exercising any judgment as to the effect of such contract upon its interests, would certainly be an idle thing. The provision in relation to the separate examination of the parties to such contract, in so far as it is applicable to a child under the age of consent, is simply directory, and is to be complied with, or not, in the discretion of the court; and this doctrine leads to the conclusion that the examination of the other parties to the contract by the judge making the order is

not absolutely necessary in order to effect the adoption of a minor. If this is so, it necessarily results that a statute, in so far as it requires that the parties shall be separately examined, is merely directory.—*In re Williams*, 102 Cal. 70, 80, 41 Am. St. Rep. 163, 36 Pac. 407. If a court has jurisdiction of adoption proceedings, the failure of the judge to examine the father of the child is a mere error of procedure which does not affect the validity of the adoption.—*Estate of McKeag*, 141 Cal. 403, 410, 99 Am. St. Rep. 80, 74 Pac. 1039. It is not necessary to adjudicate the fitness of the person seeking to adopt a dependent child in adoption proceedings, where the fitness of such person has already been adjudicated in the juvenile department and in a subsequent divorce proceeding in which the custody of the child was awarded to her.—*In re Rising*, 104 Wash. 581, 177 Pac. 351, 353. Where the fitness of a person seeking to adopt a child in care of the juvenile department has been adjudicated in that department, and it has been determined that she is a suitable and proper person to have the care and custody of the child, the question of fitness need not be adjudicated again in the adoption proceedings.—*In re Rising*, 104 Wash. 581, 177 Pac. 351, 353.

6 Order of adoption.—To give the decree of a county court adopting a child any validity, such court must have acquired jurisdiction. 1. Over the parties seeking to adopt such child; 2. Over the child to be adopted; 3. Over the parents of such child.—*Ferguson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 3 L. R. A. 620, 20 Pac. 842. An order of adoption is not a judgment of the court.—*Estate of Camp*, 131 Cal. 469, 470, 82 Am. St. Rep. 371, 63 Pac. 736. An order of adoption is void, if the person adopting the child is not a resident of the county in which the order of adoption was made.—*Ex parte Clark*, 87 Cal. 638, 640, 25 Pac. 967. But an order for the adoption of a child is not invalidated because such order is made by the court, and signed by an acting judge, and not made and signed by the regular judge in chambers.—*In re Newman's Estate*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887. So where an order of adoption is made by a probate court at the request of the adopting parent, and such order is acted upon by all parties as valid, and the adopting parent takes and keeps the custody and control of the adopted infant, and treats it as his own child for several years, and then dies, the surviving heirs and legal representatives of such deceased adoptive parent can not avoid the legal effect of the adoption proceedings for any mere irregularities or clerical mistakes.—*Cubitt v. Cubitt*, 74 Kan. 353, 86 Pac. 475. An order of the probate court permitting the adoption of an infant child is conclusive, so far as that court is concerned. Such court has no further jurisdiction in the matter.—*In re Bush*, 47 Kan. 264, 27 Pac. 1003. An order indorsed on an agreement of adoption, which order recites that the agreement of adoption is approved by the judge, and which order is filed with the county clerk, constitutes a sufficient order of adoption entitling the child to share in the estate of its adoptive parents.—

Estate of Evans, 106 Cal. 562, 39 Pac. 860. An order of adoption may declare that the child shall henceforth be treated and regarded as the child of both spouses.—*In re Williams*, 102 Cal. 70, 78, 41 Am. St. Rep. 163, 36 Pac. 407. A probate judge has no power to make an order of adoption of children without the consent of the parents, unless it appears in the record before the court that the case comes within some of the exceptions mentioned in the statute; if the case does not come within such exception, the order of adoption is not binding upon the parents.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. The method of adopting a child is by a proceeding in the probate court, and only if, after a hearing, the probate judge is "satisfied that the interests of the child will be promoted" is he authorized to make an order of adoption; which order should be that the child shall "thenceforth be regarded and treated in all respects as the child of the person adopting."—*Scott v. Scott* (Ida.), 247 Fed. 976, 979. An order on a petition for the adoption of a "neglected child," reciting that the parents, though living were not fit to have its care, and that the petitioners, fit persons therefor, adopt the child, shows on its face a want of jurisdiction, consent not being shown; but, on habeas proceedings by the mother, where such petitioners have the legal custody of the child as a ward and have shown a right to retain it, they may retain it, not as an adopted child, but as a ward until further order of the court.—*In re Bailey*, 16 Ariz. 272, 283, 144 Pac. 636.

## REFERENCES.

Legal status of adopted child.—See note 17 L. R. A. 435-439.

7. Abandoned child.—The voluntary acts of a mother in making an application to a court for an order, by virtue of which she would be legally relieved of any responsibilities as to the care and maintenance of her child, and the relinquishment by her of its custody, with the express desire that its new custodians assume the relation and stand in the place of its father and mother, are, in contemplation of law, entirely consistent with the view that she had, prior to that time, with intent to surrender the superior claim of a mother, abandoned the child. That being true, her consent to its adoption is unnecessary, and her objections thereto will be unavailing.—*Richards v. Matteson*, 8 S. D. 77, 65 N. W. 428. Whether children have been abandoned by their parents is a jurisdictional fact, to be determined by the judge on the evidence presented to him before he is authorized to entertain the petition for their adoption; and a recital in his order that it appeared to his satisfaction that they had been abandoned by their parents is a determination of this fact which can not be questioned in a collateral attack upon the order.—*Estate of Camp*, 131 Cal. 469, 471, 82 Am. St. Rep. 371, 63 Pac. 736. In a petition by heirs for the distribution of the estate of an intestate, where the petitioners are contesting the right of an adopted heir to such estate, and where it is alleged that an order was entered by the probate court consenting to and approving of

the adoption by the deceased of such child, such allegation is conclusive upon the petitioners, although the evidence and findings of the court show the contrary. Though the adoption proceedings might not constitute a bar to the father's action for the recovery of the possession or custody of a child, and not be conclusive upon him, it does not follow, because the adoption proceedings were not conclusive upon the father, that they are not conclusive upon the parties to the proceedings and their privies.—*Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23. In proceedings to adopt a child, which has been abandoned by its father, no notice of the proceedings on application of the mother need be served on the father.—*Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23. A statute which authorizes the adoption of a child on the application of its mother, and without its father's consent, where its father has relinquished his claim to such child by abandonment, is constitutional.—*Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23, 31. In deciding the right to a child as between a mother who had abandoned it and adoptive parents, the pecuniary standing of the parties is not to be considered; but the welfare of the child is of grave importance and may be made controlling.—*In re Fields*, 56 Wash. 259, 105 Pac. 466. Under California Civil Code, section 224, providing that a child may be adopted without the consent of its parents, where it has been abandoned by them, the "abandonment," as contemplated in this section, is an intention to do so, express or implied from the conduct of the parent respecting the child.—*Matter of Cozza*, 163 Cal. 514, 126 Pac. 161. The question as to whether an illegitimate child has been abandoned by its mother is one fact; and it must be determined, not merely by her objection to an adoption, but by reference to all the facts of the case.—*In re Potter*, 85 Wash. 617, 149 Pac. 23. Evidence sufficient to show the abandonment of an illegitimate child.—*In re Potter*, 85 Wash. 617, 149 Pac. 23. An adoptive father who has abandoned his child may be held answerable for the latter's support.—*Kennedy v. Sniffen*, 23 Haw. 115, 118. While an adjudication that a minor is an abandoned child under section 224, Civil Code, does not necessarily have the effect of severing the relation of parent and child its result is to enable a third party to adopt such child without the parent's consent, and for that reason the section is subjected to a strict construction whenever its application is invoked.—*Petition of Kelly*, 25 Cal. App. 651, 658, 145 Pac. 156.

#### REFERENCES.

Consent in case of abandoned children.—See subd. 7, *infra*.

8. Indian children.—In the matter of marriage between Indians, tribal customs have been recognized by the courts because they are in conformity with natural rights. But the right of adoption is contrary to natural law, and it seems that adoption by custom can not be sanctioned nor maintained.—*Non-She-Po v. Wa-Win-Ta*, 37 Or. 213, 82

Am. St. Rep. 749, 62 Pac. 15. Adoption was unknown to the common law, but was a feature of the Roman law. Yet, according to that system, some special authority of law was necessary to constitute an adoption. It never was in the power of an individual, either by the common law of England or the Roman law, to adopt the child of another at his own volition, or by the consent of its parents. There must be some special authority for such proceeding. In this state it requires the decree of a competent court, made in conformity with the provisions of the statute, to confer on a child the capacity or quality of heir to a stranger. Hence, although an infant Indian has been abandoned by its mother, the fact that it has been cared for until then by another person does not constitute a legal adoption of the infant.—*Non-She-Po v. Wa-Win-Ta*, 37 Or. 213, 82 Am. St. Rep. 749, 62 Pac. 15. Although an Indian probably resided during a portion of his childhood in the family of another Indian, that fact justifies no presumption that he was an adopted son.—*Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641. An adopted child has only such rights to inherit the property of his adopting parent as the statute under which he is adopted gives him; the statutes of the Choctaw Nation, relied upon in this case as conferring upon an adopted child the right to inherit from his adopting parent, did not disclose such right; hence, where it was conceded that the claimant did not have the right to inherit, either under the common law or under the statute of descent and distribution in force at the time of the death of the person, a full-blood Choctaw Indian woman, whom it was claimed was his adopting parent, it must follow that the right of inheritance did not exist.—*Jacobs v. Duncan (Okla.)*, 181 Pac. 936, 937. There is no law preventing the adoption of an Indian child by a French-Canadian; the difference of race is no obstacle.—*In re Pepin's Estate*; *Pepin v. Meyer*, 53 Mont. 240, 250, 163 Pac. 104, 107.

9. *Illegitimate children.*—Where the legal relation of parent and child has been established by an adoption proceeding, an illegitimate child so adopted is clothed with the full rights of inheritance of a legal child.—*Eddie v. Eddie*, 8 N. D. 376, 73 Am. St. Rep. 765, 79 N. W. 856. But an instrument signed in the presence of witnesses, declaring the one who executed it to be the father of a certain illegitimate child, naming the child's mother, and stating that the child is living as a foster son, with a physician named, is not an adoption, though it is a good acknowledgment of an illegitimate child, so as to make him the heir of the person acknowledging him.—*Estate of De Laveaga*, 142 Cal. 158, 168, 75 Pac. 790. The father of an illegitimate child, in order to adopt him as legitimate, must not only publicly acknowledge him as his own, but must receive him into his family, and if he has a wife, with her consent. If the father of such child has no family except the child, and pays for his support in another family, but the child never lived with the father at his home, there is no adoption.—*Estate of De Laveaga*, 142 Cal. 158, 169, 75 Pac. 790. The mere acknowledgment

of an illegitimate child by its father, without receiving it into his family, does not constitute an adoption of such child, and does not confer upon it any right to administer its father's estate.—*Garner v. Judd*, 6 Cal. Unrep. 675, 64 Pac. 1076. When a man has a home, where he lives with a woman whom he holds out to the world as his wife, he has a family, within the meaning of the statute, and to which he must receive an illegitimate child in order to make it legitimate.—*Garner v. Judd*, 136 Cal. 394, 396, 68 Pac. 1026. Where the father of an illegitimate child never received it into his family, or into the home in which he lived, or into or among his kindred, and did not treat the child as if he were a legitimate child, but, on the contrary, treated him and referred to him as an illegitimate child, there is no legitimation by adoption under the statute.—*Estate of De Laveaga*, 142 Cal. 158, 168, 75 Pac. 790. Statutes authorizing the adoption of illegitimate children are to be liberally construed, but a liberal construction does not require nor authorize the frittering away of the written law.—*In re Jessup*, 81 Cal. 408, 423, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028. A section of the code which provides that every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, and in all cases is an heir of his mother, and inherits his or her estate in whole or in part, as the case may be, in the same manner as if born in lawful wedlock, forms no limitation or qualification of another section of the code which relates only to the legitimizing of minor illegitimate children, and which confers a right of inheritance as the result of adoption.—*In re Jessup*, 81 Cal. 408, 421, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028. Where the father, mother, and their illegitimate children were domiciled in a foreign kingdom, whose laws made no provision for the adoption of illegitimate children by the father, such as exists in North Dakota, the conduct of the father toward them, in recognizing them as his own children, treating them as such, and contributing to their support, all occurring in the foreign state, but entirely discontinued after leaving the foreign country and coming into this jurisdiction, does not constitute an adoption under the laws of that state.—*Eddie v. Eddie*, 8 N. D. 376, 73 Am. St. Rep. 765, 79 N. W. 856. A decree of distribution to an illegitimate child of a deceased brother of decedent, of part of the estate, in the right of his deceased father, must be reversed where such child has not been legitimated by adoption.—*Estate of De Laveaga*, 142 Cal. 158, 171, 75 Pac. 790. An illegitimate child is sufficiently received "into the family" to establish its adoption where it is received in the house in which the father has his fixed place of abode, notwithstanding that he is unmarried and lives there alone for long periods of time.—*Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307. An illegitimate unmarried minor child can not be adopted under the laws of Oklahoma without the consent of the mother.—*Allison v. Bryan*, 26 Okl. 520, 138 Am. St. Rep. 988, 30 L. R. A. (N. S.) 146, 109 Pac. 934, 935. Evidence sufficient to show that the interest of an

illegitimate child would be better served by an order of adoption than by giving it into the custody of the mother.—*In re Potter*, 85 Wash. 617, 149 Pac. 23.

## REFERENCES.

For an instructive case on the legitimation of an illegitimate child, see *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, 31 Pac. 915. A statute concerning the adoption of illegitimate children, enacted before the adoption of the codes, is to be strictly construed, as being in derogation of the common law, but the code provisions on that subject are to be liberally construed.—*Estate of Jessup*, 81 Cal. 408, 421, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028.

10. Evidence of adoption.—The best evidence of adoption is the order of the court made in the proceeding therefor pursuant to statute; and in the absence of anything to show that any of the required legal steps were ever taken, or the record thereof has been lost or destroyed, the unexplained statement of a witness that he was adopted is but a conclusion without probative force. A matter of such importance as the adoption of an heir, which can be accomplished only by strict compliance with the statute, can never be presumed in the absence of competent testimony.—*Henry v. Taylor*, 16 S. D. 424, 93 N. W. 641, 642. The acknowledgment of a foster father who had previously adopted the infant, is necessary to the validity of an instrument of adoption under Code Iowa 1873, sections 2307, 2311, which required the acknowledgment of the parents in the manner of the acknowledgment of deeds.—*Long v. Dufur*, 58 Or. 162, 113 Pac. 59. If a testatrix names a person as being her adopted son, the will is sufficient evidence of adoption.—*Dawley v. Dawley's Estate*, 60 Colo. 73, 152, Pac. 1171. The fact of adoption can not be established by a paper, the effect of which is no more than a relinquishment of parental control by the father of the child concerned.—*In re Lind's Estate*, 90 Wash. 10, 155 Pac. 159.

## REFERENCES.

Will as evidence.—See note on the execution of wills, post, following table after § 900. See note on family allowance, post, following table after § 140.

## 11. Effect of adoption.

(1) In general.—After the adoption of a child, it ceases to sustain any relation to its actual parents.—*Younger v. Younger*, 106 Cal. 377, 380, 39 Pac. 779. The residence of an adopted child is that of its foster parents.—*Estate of Taylor*, 131 Cal. 180, 182, 63 Pac. 345. The adoption in law which results from an adoption in fact is the same, in legal effect, as that resulting from an adoption by decree of court.—*Eddie v. Eddie*, 8 N. D. 376, 73 Am. St. Rep. 765, 79 N. W. 856. The amendment of the Kansas statute of 1891 of the act concerning descents and distributions did not repeal or limit the rights conferred on an adopted



child by the adoption act and to which he was entitled prior to said amendment.—*Riley v. Day*, 88 Kan. 503, 44 L. R. A. (N. S.) 296, 129 Pac. 524. Where a party has elected to stand upon a claim as a child of the decedent, expressly disclaiming any interest through adoption, he can not fall back upon the other claim after failing in the stand taken.—*In re Lind's Estate*, 90 Wash. 10, 155 Pac. 159.

(2) As to taking name.—Under the adoption acts of the State of Kansas, a child legally adopted takes the name of the adopting parents and is given the same personal rights and is entitled to the same rights of inheritance as a natural child.—*Riley v. Day*, 88 Kan. 503, 44 L. R. A. (N. S.) 296, 129 Pac. 524. In Kansas a child legally adopted takes the name of the adopting parent and is given the same personal rights and rights of inheritance as a natural child. The rights of an adopted child have not been in any way repealed or limited by the amendment in 1891 of the act relating to descents and distributions. The words "living issue" in that amendment were used in the sense of "living children," so that an adopted child of a prior deceased daughter of an intestate inherits through her adopted mother.—*Riley v. Day*, 88 Kan. 503, 44 L. R. A. (N. S.) 296, 129 Pac. 524.

(3) Upon rights of parents.—A natural parent, by her voluntary act in consenting to the adoption of her child by another, becomes divested of all legal rights and obligations in respect to such child, and the situation is not changed by the death of the adoptive parent. Hence, a decree of adoption divests the mother and grandmother of any right to be appointed as guardian of the child after its father's death.—*In re Masterson's Estate*, 45 Wash. 48, 122 Am. St. Rep. 886, 87 Pac. 1047. The natural parent of an adopted child has no parental rights over such child after its adoption and therefore can not take proceedings under Political Code, section 3205, 3214, for the protection of the child from an improper guardian.—*State v. Kelley*, 32 S. D. 526, 143 N. W. 953. The effect of an adoption under the California Civil Code is to establish the legal relation of parent and child, with all the incidents and consequences of that relation and necessarily implies that the natural relationship between the child and its parents is superseded, and as the adopted child has the right to succeed to the estate of the adopting parent, so the adopting parent is entitled to inherit as a parent to the exclusion of the parent by blood, and the blood relationship is not revived by the death of the adopting parent prior to the death of the child.—*Estate of Jobson*, 164 Cal. 312, 315, 43 L. R. A. (N. S.) 1062, 128 Pac. 938.

(4) As to guardianship.—A decree of adoption divests the mother and grandmother of any right to be appointed as guardian of the child after its father's death.—*In re Masterson's Estate*, 45 Wash. 48, 122 Am. St. Rep. 886, 87 Pac. 1047.

(5) **Rights of inheritance.**—The minor child of a decedent does not lose his heirship by being adopted, pending the settlement of the estate, into the family of another.—*Estate of Pillsbury*, 175 Cal. 454, 166 Pac. 11. The adopting parent is, by the adoption, substituted for the parent by blood, with all its logical results; the adopting parent inherits from the child to the exclusion of the blood parent and the child inherits from him.—*In re Darling's Estate*, 173 Cal. 221, 159 Pac. 606. The necessary effect of the statutory provisions, as to adopted children, is to establish, as between the adopting parent and the adopted child, the legal relation of parent and child, with all the incidents and consequences of that relation, including the right of the child to inherit as a child from the adopting parent.—*Darling's Estate*, 173 Cal. 221, 159 Pac. 606.

(6) **Divorce proceedings.**—Although a child may be under the jurisdiction of a court, in divorce proceedings between its parents, that does not prevent another court from taking jurisdiction of the same child in proceedings for its adoption, where the parent to whose custody it has been given consents to the adoption proceedings.—*Younger v. Younger*, 106 Cal. 377, 39 Pac. 779. In divorce proceedings, the jurisdiction of the court over the children of divorced parents is lost by valid adoption proceedings. Although the court, in the divorce proceedings, may have jurisdiction of the child because of the fact that it is the child of the parties to the action, and may have power to award its custody as it may deem for its best interests, and to direct provision for its maintenance and support, the adoption proceeding wholly changes the status of the child. It becomes ipso facto the child of another, and ceases to sustain that relation, in a legal sense, to its natural parents. The adoption proceedings extinguish the jurisdiction of the court as absolutely as though death had intervened.—*Younger v. Younger*, 106 Cal. 377, 379, 39 Pac. 779.

(7) **Decree of adoption.**—A decree of adoption, when lawfully rendered, is a final adjudication of the status of a minor and fixes and determines its legal parentage, by extinguishing the parental rights of natural parents, and substituting parental rights therefor, and the court has no continuing jurisdiction over the cause or the parties as in a guardianship or divorce proceedings.—*In re Lease*, 99 Wash. 413, 169 Pac. 816, 817. An adoption decree does not divest the state of the power, acting through its courts, to take the custody of an adopted minor from its foster parent or parents when there is lawful reason therefor, arising out of his or their delinquency with respect to the minor, the foster parents being in this respect in no stronger position than would the natural parents be.—*In re Lease*, 99 Wash. 413, 169 Pac. 816, 817.

(8) **Contracts for compensation for support; actions thereon, etc.**—After the legal adoption of a minor child by another person the parental obligations of its natural parents cease to exist, and they are no more legally liable for the maintenance, support and education of such child

than would be a perfect stranger. It follows that an adopting parent may contract with the natural parents or with its mother and her second husband, to take care of, support and educate the child for compensation as freely and legally as such a contract could be made by the adopting parent with a stranger to the blood of such child.—*Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426. It is held that, applying the principles of evidence to the motion for a nonsuit, the evidence for the plaintiff must be taken as showing that the agreement for compensation was with the plaintiff's husband as well as with his wife, the child's mother; that the care of the adopted child can not be presumed gratuitous; that an explanation of a payment of \$1100 made to the mother after receiving the adopted child, not connected with compensation therefor, but in consideration of her relinquishment of a claim against a different estate, in which her mother and the adopting parent were interested, must be assumed as true; and that every favorable inference and presumption from the evidence must be taken as true; and that the nonsuit can not be sustained.—*Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426. In an action by the second husband of the mother of a child which had been legally adopted by the deceased, after the mother's divorce from its father, and which had been committed to the care of the mother and such second husband under an agreement for compensation, which action was brought for such compensation upon a rejected claim against the adopting parent's estate, and in which the evidence for the plaintiff was sufficient to make a prima facie case for recovery, it was error to grant a nonsuit therein at the close of the plaintiff's evidence.—*Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426. The court properly allowed evidence on the cross-examination of the plaintiff to show that the \$1100 had been received from the adopting parent by the mother after she received the care of the child for the purpose of an inference that it was received in payment therefor, though the answer may show a purpose foreign thereto.—*Mitchell v. Brown*, 18 Cal. App. 117, 122 Pac. 426.

(9) *Appeal*.—Where the probate court has granted a petition for the adoption of a child, such order is final and appealable and the father of the child may maintain an appeal from the order even though in divorce proceedings the custody of the child had been awarded to the mother.—*Heydorf v. Cooper*, 90 Kan. 511, 135 Pac. 518.

#### 12. Attacking the order.

(1) *In general*.—A parent is not entitled to the custody of a child who is old enough to work and care for himself, after consenting to his emancipation; but there is no basis for such a claim, if the minor is a young child incapable of caring for himself, although the parent consented to another's custody of such child under an illegal order of adoption.—*Ex parte Clark*, 87 Cal. 638, 642, 25 Pac. 967. Although the natural parents of a child have acquiesced in the claim of its adopting parents for several years, they are not estopped from asserting their

right to the custody of such child as against an illegal order of adoption. If the right to a transfer of a child from the custody of the adopting parents to the custody of its natural parents is brought up on a writ of habeas corpus, the court must take the record as it finds it, and determine the rights of the parties accordingly, irrespective of proceedings taken to amend the record of adoption so as to make it conform with the law.—*Ex parte Clark*, 87 Cal. 638, 641, 25 Pac. 967. The validity of adoption proceedings can not be questioned by one who claims as the distributee of one who adopted a child and received the benefit of the relation.—*Estate of McKeag*, 141 Cal. 403, 411, 99 Am. St. Rep. 80, 74 Pac. 1039.

(2) *Time for relief.*—Where a minor child has been awarded to a person other than its parent, in adoption proceedings, of which the parent has been given no notice in advance, such parent may petition for relief from the order of adoption, if he proceeds at any time within six months from the filing of the order.—*Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874.

(3) *Collateral attack.*—A decree of adoption, valid on its face, is not open to a collateral attack.—*In re Pepin's Estate*; *Pepin v. Meyer*, 53 Mont. 240, 250, 163 Pac. 104, 107. If, in a proceeding to contest a will and to procure revocation of the probate thereof, the petitioner, as a means to the end in view, attacks an order of adoption, such an attack is not direct but collateral.—*In re Pepin's Estate*; *Pepin v. Meyer*, 53 Mont. 240, 250, 163 Pac. 104, 107. On a collateral attack on an order of adoption, in proceedings to revoke letters of administration, a recital in the order of adoption that "the petitioner and said minor child, and all persons whose consent is necessary, have appeared herein as provided by law," is sufficient to show that the father of the child was present at the hearing on the petition of adoption.—*Estate of McKeag*, 141 Cal. 403, 408, 99 Am. St. Rep. 80, 74 Pac. 1039. An order of adoption may be collaterally attacked on a writ of habeas corpus for want of notice to those who are entitled to notice.—*Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937, 13 Ann. Cas. 585, 88 Pac. 1109.

(4) *For fraud.*—Secret removal of the child to another county by the mother and the institution in that other county of adoption proceedings without notifying the father, or the court, that divorce proceedings were pending in another court between the parents is a fraud upon the court granting the adoption which was properly set aside on application of the father.—*Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403. A person who would avoid an order of adoption or other transaction for fraud must show that he has rights which were vested at the time and which were injuriously affected by it; one whose rights accrue after a judgment is rendered can not attack the judgment.—*In re Pepin's Estate*; *Pepin v. Meyer*, 53 Mont. 240, 250, 163 Pac. 104, 107.

(5) Appeal.—Where the court is satisfied of the fitness and propriety thereof a ruling authorizing an adoption will not be reviewed except for abuse of discretion, and where consolidated applications are heard for the adoption of an orphan by relatives of the mother, and for guardianship by relatives of the father, it is not an abuse of discretion to deny the adoption and grant the guardianship where both parties are suitable to have the care of the child.—*In re Wells*, 60 Wash. 518, 111 Pac. 778. Where upon the granting of a divorce the custody of a child has been awarded to the mother, the father may maintain an appeal from an order of the probate court granting a petition for the adoption of the child.—*Heydorf v. Cooper*, 90 Kan. 511, 135 Pac. 578.

13. What will not invalidate proceedings.—That the father of a boy, at the time of its adoption, made false statements concerning the death of its mother, or that the adopting parent would not have adopted the boy had he known that the mother was living, or that the boy afterwards became incorrigible, and was sent to the reform school, and was subsequently taken therefrom by his natural mother, or that the plaintiff did not subsequently, in one state, take steps to adopt the boy, does not appear to render the adoption had in another state illegal.—*James v. James*, 35 Wash. 650, 77 Pac. 1082, 1084. Where adoption proceedings in another state are alleged to be void under the laws of that state, and the laws of that state, showing wherein the adoption is void and of no effect, are not set forth, a court, in determining the question, will apply the *lex fori*.—*James v. James*, 35 Wash. 650, 77 Pac. 1082, 1084. In the absence of any statute prescribing the manner in which a probate judge's records shall be kept, or of evidence that he kept them in any other way than by writing them out upon sheets of paper, the record of his office, showing his consent and approval of the adoption of a child, is sufficient, though such record is on a detached piece of paper retained among the papers of his office.—*Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23, 25. Even the failure of a probate judge to do his duty does not work the destruction of the rights of others who have done all that they were required to do in the matter.—*Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 20 L. R. A. 199, 33 Pac. 23, 25. The surviving heirs and legal representatives of an adoptive parent, who died after the adoption of an infant, can not avoid the legal effect of the adoption proceedings for any mere irregularities of clerical mistakes, where the order of adoption was made by the probate court at the request of the adoptive parent, and such order was acted upon by all parties as valid, and the adoptive parent took and kept the custody and control of the adopted infant, and treated it as his own child for several years, until the death of the adoptive parent.—*Cubitt v. Cubitt*, 74 Kan. 353, 86 Pac. 475. If it clearly appears from the record in proceedings had in the probate court for the adoption of an infant that all interested parties were present in court, and that the court made an order that such infant be adopted, the mere fact that the name of the infant's mother appears in the order of adop-

tion where the name of the adopting parent should have been written is immaterial, and will be disregarded, when it is clearly apparent from such record that the name was there written by an oversight and mistake, and that the name of the adopting parent was intended.—*Cubitt v. Cubitt*, 74 Kan. 353, 86 Pac. 475. When under a decree of divorce the custody of the children is given to the mother the divorced father is not entitled to notice of proceedings for the adoption of one of the children.—*In re Beers adoption*, 78 Wash. 576, 139 Pac. 629, 631. The construction of the statute of the state of Washington, holding that a divorced father, custody of children being given to the mother, is not entitled to notice of adoption proceedings, is not unconstitutional for the right of a parent to the custody of a child is not an absolute right, but is subject to the right of the state to interfere in the interests of the child, and the father had had his day in court concerning the custody during the divorce proceedings.—*In re Beers Adoption*, 78 Wash. 576, 139 Pac. 629, 631. Evidence relating to the want of fitness of an adopting parent upon the hearing of a petition to set aside the order of adoption on the ground that the father had had no notice of the proceedings, the petition being granted on that ground, is inadmissible as the question of fitness may always be considered in another proceeding to determine what was for the best interests of the child.—*In re Beers*, 78 Wash. 576, 139 Pac. 633.

## REFERENCES.

See order of adoption, subd. 6, ante.

14. *Adoption in another state.*—If a child has been adopted in another state, whose laws require the act of adoption to be evidenced by an instrument in writing signed by the parties consenting to the adoption, which instrument must be acknowledged and recorded in the county where the person adopting the child resides, proof of the adoption can not be made in another state, without a compliance with such requirements. The failure to record the instrument of adoption would, of itself, be fatal to the legality of the proceeding.—*James v. James*, 35 Wash. 650, 77 Pac. 1080. If a claim is made that proceedings in another state for the adoption of a child are void under its laws, but such laws, showing wherein the adoption is void, are not set out, the court, in determining the question, will apply the law of the forum.—*James v. James*, 35 Wash. 655, 77 Pac. 1082. The adoption of a child in another state must be proved by the laws of that state, and it must be shown that those laws have been strictly followed; since the power to adopt children was unknown to the common law and is a creation of statute merely.—*Estate of McCombs*, 174 Cal. 211, 162 Pac. 897.

15. *Inheritance.*

(1) *Right of adopted child.*—An adopted child is entitled to succeed by inheritance to the estate of the adopting parents.—*In re Newman*, 75 Cal. 213, 219, 7 Am. St. Rep. 146, 16 Pac. 887; *Estate of Wardell*, 57

Cal. 484, 491. Where a child has been adopted by legal proceedings, with the agreement that he shall have the right to inherit property of the adopting parents, the heirship of the child is established by the order of the court.—*Quinn v. Quinn*, 5 S. D. 328, 49 Am. St. Rep. 875, 58 N. W. 808. A child adopted in a sister state, in substantial compliance with her statutes, may inherit lands of the deceased adopting parents in this state, on equal terms with a child of such parents born in wedlock; and the heirs of an adopted daughter may inherit, through her, a share of the estate of the deceased adopting parent as if it were his own child born in wedlock; and it may inherit property in other states than that in which the adoption was had from its adopting parent.—*Gray v. Holmes*, 57 Kan. 217, 33 L. R. A. 207, 45 Pac. 596. Where adoption proceedings are regulated by statute, the right of children to inherit can only be acquired through adoption by a substantial compliance with the provisions of the statute.—*Ex parte Clark*, 87 Cal. 638, 25 Pac. 967. If a testator dies, leaving a will in which no reference is made to an adopted child, and such omission is not expressed on the face of the will to have been intentional, such child is entitled to share in the testator's estate, the same as if he had died intestate.—*Estate of Wardell*, 57 Cal. 484, 491. If a mother's consent to the adoption of her child is gained under an agreement that such child shall have a share of the property of the adopting parent, it can not be deprived of its right to such property by will, or by any subsequent fraudulent disposition thereof.—*Quinn v. Quinn*, 5 S. D. 328, 49 Am. St. Rep. 875, 58 N. W. 808. A pretermitted adopted child is entitled to a share in a testator's estate, the same as if he had died intestate.—*Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530, 532. To establish heirship under acts providing for the adoption of children, the enactments must be looked to to ascertain the rights of the plaintiff. A child may be adopted by one parent and not by another, and the rights thus acquired would be simply rights in the estate of the adopting parent, and would leave the right of inheritance as to non-adopting parent wholly unaffected by the act of adoption. Hence where an act of the legislature gives one certain rights as the adopted child of a husband, but does not make such child the natural heir of the wife, or give the child any inheritable rights as the daughter of such wife, the act can not be extended, and the child, though adopted by one of its parents, does not thereby become entitled to inherit from the other.—*Webb v. Jackson*, 6 Colo. App. 211, 40 Pac. 467. The words "living issue" as used in the amendment of 1891 of the act concerning descents and distributions were employed by the Kansas legislature in the sense of living children and hence an adopted child of a prior deceased daughter of an intestate does inherit a portion of the estate of such intestate through her adopting mother.—*Riley v. Day*, 88 Kan. 503, 44 L. R. A. (N. S.) 296, 129 Pac. 524. Where the law under which a child is adopted limits its right of inheritance to the estate of the adoptive parents, such child can not, after the death of its adoptive

father, inherit from the deceased brother of such adoptive father, or his other collateral kindred.—*Boaz v. Swinney*, 79 Kan. 332, 99 Pac. 621. An adopted child has no right of inheritance from its adopted parents other than those given by the law under which it was adopted. *Boaz v. Swinney*, 79 Kan. 332, 99 Pac. 621. As the right of inheritance is purely a matter of statutory regulation, so is the subject of the adoption of children and the rights and obligations springing therefrom.—*In re Jobson's Estate*, 164 Cal. 312, 43 L. R. A. (N. S.) 1062, 128 Pac. 938. A person who makes an enforceable promise to adopt a child, and so make the child his heir, does not thereby bind himself to leave property for the child to inherit, or to restrain himself from disposing of property during his lifetime in any way he sees fit, acting in good faith.—*Maloney v. Cameron*, 99 Kan. 70, 161 Pac. 1180. An adopted child has precedence over collateral heirs under the laws of succession.—*In re Pepin's Estate*; *Pepin v. Meyer*, 53 Mont. 240, 250; 163 Pac. 104. The right of inheritance is not necessarily incident to the relationship of parent and child; hence, it is not necessarily incident to the relationship of adoption; an adopted child does not have the right to inherit from his adopting parent unless the statute under which he is adopted gives that right to him.—*Jacobs v. Duncan* (Okla.), 181 Pac. 936, 937.

(2) *Illegitimate children*.—The law has established cognatic relations between illegitimate children acknowledged or adopted by their father and legitimate children, and either is as capable of inheriting as the other.—*Estate of Wardell*, 57 Cal. 484, 491. One of the objects of adoption, and of legitimatizing by adoption, is to give the capacity of inheritance. *In re Jessup*, 81 Cal. 408, 422, 6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028. Where the right of succession to the estate of a deceased person depends upon the legitimation of illegitimate children of the deceased under section 230 of the Civil Code, and an adversary verdict was found upon questions submitted, that deceased was the father of each child, that he publicly acknowledged each during its minority as his own child, that he received each into his family as his own child and that he otherwise treated each child during its minority as if it were his legitimate child, and the trial court adopted these findings as its own, such findings are sufficient to establish the right of succession; and the main question first to be considered is the assigned insufficiency of the evidence to support them.—*Estate of Gird*, 157 Cal. 534, 137 Am. St. Rep. 131, 108 Pac. 499. If, during the existence of a marriage, the wife has children and the husband acknowledges them as his children, and treats them as his during his lifetime, they become his lawful heirs, and others can not prove, after his death, that such children were illegitimate.—*State v. Clifford*, 81 Wash. 324, Ann Cas. 1916D, 329, 142 Pac. 472.

(3) *Agreement of adoption*.—If an agreement of adoption by which the adopting parent "covenants and undertakes to give" the adopted child the same rights in her estate after her decease as though the

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child were her natural child, is not sufficient of itself to confer the right of inheritance, the statute gives the agreement full force and effect in that regard by clothing the adopted child with the right of inheritance.—*Leialoha v. Walters*, 21 Haw. 304.

(4) **Rights of adopting parent.**—An adopted child acquires no greater right than a natural child, that of inheritance, and adoption does not deprive the adoptive parent of the right to dispose of his property by will unless he is deprived of such right by a contract binding him to give his property to his adopted child.—*Forsyth v. Heward*, 41 Nev. 305, 314, 170 Pac. 21. If the act of adoption confers upon the child the right to succeed to the estate of the adopting parent in like manner as a child of the blood, it must follow that, upon the death of the child, the adopting parent is entitled to inherit as a parent. To hold that, although the relation of parent and child existed between such parent in blood, and that such relation was supplanted by the new relation created by the adoption, but that nevertheless upon the death of the foster parent such former relation was revived, would be to make, rather than to construe, a statute. Once the conclusion is reached that the effect of adoption in the code is to substitute the adopting parent for the parent by blood, this conclusion must be given its logical results.—*In re Jobson's Estate*, 164 Cal. 312, 43 L. R. A. (N. S.) 1062, 128 Pac. 938-940. The statutes of Colorado make an adopted child an heir of the adopting parent, and the adopting parent an heir of the child, if he dies without marriage or issue; but this latter provision does not apply to the heirs of the adopting parent, as the relation created by adoption is regarded as personal between the adopting parent and adopted child.—*Russell v. Jordan*, 58 Colo. 445, 450, Ann. Cas. 1916C, 760, 147 Pac. 693. The statute, relating to adoption, makes the adopted child an heir of the adopting parent, and provides that, if the adopted child shall die without marriage or issue, his estate shall go to the adopting parent; the provision does not, however, apply to the heirs of the adopting parent, and as to them the general law of descent applies.—*Russell v. Jordan*, 58 Colo. 445, Ann. Cas. 1916C, 760, 147 Pac. 693.

(5) **Children of adopting parent.**—The children of an adopting father do not, under the Colorado statute, inherit from the adopted child; the relation created by adoption is regarded as personal between the adopting parent and adopted child; hence, the right of children of the adopting parent to inherit is governed by the general law of descent.—*Russell v. Jordan*, 58 Colo. 445, 450, Ann. Cas. 1916C, 760, 147 Pac. 693.

#### REFERENCES.

Inheritance by adopted children.—See note on "Succession," post. Inheritance by illegitimate children.—See subd. 9, ante. Right of adopted children to inherit.—See note 118 Am. St. Rep. 684-688. Right of adopted child to inherit property from a relative of its adoptive

parent.—See notes L. R. A. (N. S.) 117-123, 33 L. R. A. (N. S.) 139. Inheritance from adopted child.—See note 17 L. R. A. 437. Power to give child under existing adoption right to inherit from parent or parent's relatives.—See note 35 L. R. A. (N. S.) 216. Descent and distribution of property of adopted child.—See note 43 L. R. A. (N. S.) 1056. Right of child adopted in other state to take under local statute of descent and distribution.—See note 21 L. R. A. (N. S.) 679, 25 L. R. A. (N. S.) 1285.

16. *Specific performance.*—Where a man and his wife, who have no children, orally agree that, in consideration of a young girl becoming a member of the family, and giving to them love, obedience, and service, they would rear and treat her as their own child, and at their death leave her all of their property, and there is full and faithful performance of the agreement by the girl, such agreement will be enforced by a court of equity, providing there are no circumstances of conditions which would render enforcement inequitable.—*Bichel v. Oliver*, 77 Kan. 696, 95 Pac. 396, 397. In a case where the steps leading up to the complete adoption of a minor child have fallen short in respect of only a technicality in following the statute, the child having been practically taken by the person applying to adopt him and having for years looked to this person as his parent to all intents and purposes, equity, which considers things as done which ought to have been done, and which countenances contracts such as this, gives the right to enforce specific performance in favor of the adopted persons and those claiming under them.—*Barney v. Hutchinson* (N. M.), 177 Pac. 890. The court recognizes the frequency of fraudulent claims of adoption of children under oral promise to parents to dispose of their property by will in favor of such children; but recognizes also the duty of trial courts to discriminate, since such claims are not all fraudulent. Courts must see to it that witnesses are telling the truth.—*Cathcart v. Myers*, 97 Kan. 727, 156 Pac. 751. On a contention that decedents agreed to adopt the plaintiff and make him, on their deaths, the owner of whatever property they might leave, the court held nothing to have been proved except the agreement to adopt.—*Forsyth v. Heward*, 41 Nev. 305, 170 Pac. 21. Where there has been no attempt at a legal adoption, but only an agreement between the parent of a female child and the other person, whereby, in consideration of the former's relinquishing the child, the latter, having no children of his own, stipulated to receive, keep, and care for her as his own child to all intents and purposes, and adopt her and make her his heir at law, the child, on the death of such person, may prove that she lived with him as his daughter, took his name, and behaved dutifully toward him till his death, and was treated as a daughter by him, and may successfully claim his property, as against collateral heirs, on making such proof.—*Jacks v. Masterson*, 99 Kan. 89, 160 Pac. 1002.

## REFERENCES.

Adoption by one person of the children of another.—See note 39 Am. St. Rep. 210-231, Kerr's Cal. Civ. Code, §§ 221-230, and notes. Specific performance of contract to make a will.—See note on executory contracts of deceased, following table after § 610, post. Enforceability of contract to give child share of estate in consideration of the surrender of the child to promisor, as affected by noncompliance with the statute prescribing mode of adoption.—See note 46 L. R. A. (N. S.) 1134.

17. *Hawaii*.—In the Hawaiian Islands there have been two classes of adoption: one oral, by ancient custom before the existence of written law, and the other under the written law, which requires the execution and recording of an agreement in writing. But a right of inheritance in the adopted child is not a necessary result of adoption by either method, unless such right is clearly defined and proved, or expressed in the written agreement.—*Mellish v. Bal*, 3 Haw. 123, 127; *Estate of Maughan*, 3 Haw. 262, 270; *Estate of Nakuapa*, 3 Haw. 410, 415; *Wei See v. Young Sheong*, 3 Haw. 489, 495; *Estate of Wilhelm*, 13 Haw. 206, 211; citing former cases. An oral adoption, however, where it is clearly proved to have been an adoption as heir, may include a right of inheritance in the adopted child.—*Estate of Nakuapa*, 3 Haw. 342, 347; *Kia-ialina v. Kahanu*, 3 Haw. 368, 369. Where the law requires agreements of adoption to be in writing and recorded, proof of a compliance with these requirements is necessary to a valid adoption.—*Abenela v. Kailikole*, 2 Haw. 660, 662. A written agreement of adoption, executed but not recorded until after the death of the adopting parent, is invalid.—*Black v. Castle*, 7 Haw. 273, 275. An adoptive father does not inherit the property of an adopted child.—*Estate of Namaau*, 3 Haw. 484, 486. A decree of adoption, by a court of competent jurisdiction, can not be impeached collaterally on account of informality of the record.—*Paris v. Kialoha*, 11 Haw. 450, 452.

## REFERENCES.

Inheritance by adopted children.—See note on Succession, following table after § 41, post. Contractual relation independent of the law of adoption.—See note on specific performance of executory contracts of deceased, following § 610, post.

18. *Adoption of adults*.—The adoption of adults is not authorized by statute in Hawaii.—*Souza v. Sao Martinho Society*, 24 Haw. 643; overruling *Souza v. Lusitana Society*, 24 Haw. 396.

19. *Agreement to adopt*.—An agreement of adoption, executed before but not recorded until after a guardian had been appointed for the child, is not effective as against the guardian's right to the custody of the child.—*Wikoli, re*, 23 Haw. 241, 243. Although the approval of the county probate judge is an indispensable feature of a statutory adoption, a written agreement to adopt between the parents of the child and

persons wishing to adopt it, may, if supported by a sufficient consideration, and followed by the child's living with these persons, taking their name and being treated as their child, gives the child an enforceable claim against the estates of said persons, but no right to inherit.—*Maloney v. Cameron*, 98 Kan. 620, 159 Pac. 19; see same case on rehearing, 99 Kan. 70, 424, 677, 161 Pac. 1180.

20. *Welfare of child.*—The welfare of the child is the first thing to be considered in adoption proceedings.—*In re Potter*, 85 Wash. 617, 149 Pac. 23. In a petition for the adoption of a minor the all important factor in the determination of the question is the welfare of the child. The matter of adoption rests in the sound discretion of the court and in the exercise of that discretion information from all proper sources should be sought by the one who must determine the matters so momentous to the infant. A denial of a petition to adopt will not be disturbed on appeal without the showing of a very grave abuse of discretion by the court.—*In re Bewley*, a minor, 167 Cal. 8, 138 Pac. 689; *In re Fields*, 56 Wash. 259, 105 Pac. 466.

21. *Appeal and habeas corpus.*—The trial judge who has heard all the testimony relative to the rejection of her illegitimate child by a prostitute and the circumstances of the child's being taken by others to be cared for is entitled to have his determination respected by a reviewing court.—*In re Lew Choy Foon*, 173 Cal. 159, 159 Pac. 440. In the absence of findings of fact or any statement of facts touching the question, the court on appeal from an order vacating and setting aside a decree of adoption, can not review the facts.—*In re Lease*, 99 Wash. 413, 169 Pac. 816. Where an order permitting the adoption of a minor child, without the consent of its mother, is appealed from, the appellate court can not direct the restoration of the child to its mother, on reversal of the order, but her remedy is to obtain possession of the child under habeas corpus proceedings.—*Matter of Cozza*, 163 Cal. 514, Ann. Cas. 1914A, 214, 126 Pac. 161.

## CHAPTER II.

## SUCCESSION.

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## LAW OF SUCCESSION.

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|-----------------------------------|---|
| 1. Taking by descent.             | (3) Under agreements.                   |
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| (4) Timber-culture claims.        | (1) In general.                         |
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| (1) In general.                   | 8. Descent to grandparents.             |
| (2) As a survivor.                | 9. Who can not inherit.                 |

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| <p>10. Inheritance by convict.<br/> 11. Inheritance by aliens.<br/> 12. Inheritance by Indians.<br/>     (1) In general.<br/>     (2) Estates and title.<br/>     (3) Taking by inheritance.<br/>     (4) Five Civilized Tribes.<br/>     (5) Under the Creek law.<br/>     (6) Same. Substitution of laws of Arkansas.<br/>     (7) Same. Course of descent.<br/>     (8) Same. Creek freedmen.<br/>     (9) Osage Indians.<br/>     (10) Choctaw Indians.<br/>     (11) Seminoles.<br/>     (12) Cherokees.<br/>     (13) Peoria Indians.<br/>     (14) Chickasaws.<br/>     (15) Muscogees.<br/>     (16) State law governs since statehood.<br/>     (17) Indian marriages.<br/>     (18) Inheritance by or through illegitimate Indian children.</p> | <p>(19) What law governs.<br/> 13. Taking by contract, agreement, or family settlement.<br/> 14. Repudiation of will and taking under the statute.<br/> 15. Inheritance by or through illegitimate children.<br/>     (1) Right of. Acknowledgment.<br/>     (2) Succession to estate of illegitimate not acknowledged or adopted.<br/>     (3) Sufficiency of acknowledgment. Evidence of recognition.<br/>     (4) Presumption as to legitimacy.<br/>     (5) Illegitimacy, how inferred.<br/>     (6) Construction of Utah statute.<br/>     (7) Right of non-resident alien.<br/>     (8) Pretermitted illegitimate child.<br/> 16. Construction of statutes.<br/>     (1) In general.<br/>     (2) Divorce decrees.<br/> 17. What law governs.</p> |
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#### § 15. Definition of.

Succession is the coming in of another to take the property of one who dies without disposing of it by will.  
—*Kerr's Cyc. Civ. Code*, § 1383.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Idaho\*—Compiled Statutes of 1919, section 7791.  
Montana\*—Revised Codes of 1907, section 4818.  
New Mexico—Statutes of 1915, section 1837.  
North Dakota\*—Compiled Laws of 1913, section 5741.  
Oklahoma\*—Revised Laws of 1910, section 8416.  
South Dakota\*—Compiled Laws of 1913, volume II, page 192, section 1092.  
Utah\*—Compiled Laws of 1907, section 2824.

#### § 16. Estate passes to whom.

The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration.—*Kerr's Cyc. Civ. Code*, § 1384.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Hawaii—Revised Laws of 1915, section 3243.

Idaho\*—Compiled Statutes of 1919, section 7792.

Montana\*—Revised Codes of 1907, section 4819.

New Mexico—Statutes of 1915, section 1837.

North Dakota\*—Compiled Laws of 1913, section 5742.

Oklahoma\*—Revised Laws of 1910, section 8417.

South Dakota\*—Compiled Laws of 1913, section 3399.

Utah\*—Compiled Laws of 1907, section 2825.

Washington—Remington's 1915 Code, section 1366.

**§ 17. Succession to and distribution of property.**

When any person having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the Code of Civil Procedure, subject to the payment of his debts, in the following manner:

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation;

2. If the decedent leaves no issue, the estate goes one-half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead then to the other;

3. If there is neither issue, husband, wife, father, nor mother then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation;

4. If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife;

5. If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote;

6. If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by right of representation;

7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them has left issue, the



estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation;

8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation.

9. If the decedent leaves no husband, wife, or kindred, and there are no heirs to take his estate or any portion

thereof, under subdivision eight of this section, the same escheats to the state for the support of the common schools.—*Kerr's Cyc. Civ. Code*, § 1386.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

**Alaska**—Laws of 1917, chapter 45, page 82; amending subdivisions 2 and 3 of section 594, Compiled Laws of 1913.

**Arizona**—Revised Statutes of 1913, paragraphs 1091-1105.

**Colorado**—Laws of 1915, chapter 174, page 498; amending Mills's Statutes of 1912, section 7838.

**Hawaii**—Revised Laws of 1915, section 3243.

**Idaho**—Compiled Statutes of 1919, section 7793.

**Kansas**—General Statutes of 1915, sections 3831, 3841, 3843, 3844, 3854.

**Montana**—Revised Codes of 1907, section 4820.

**Nevada**—Revised Laws of 1912, section 6116, as amended by Statutes of 1913, chapter 70, page 56; by Statutes of 1915, chapter 130, page 149; and by Statutes of 1917, chapter 33, page 37.

**New Mexico**—Statutes of 1915, section 1838.

**North Dakota**—Compiled Laws of 1913, section 5743.

**Oklahoma**—Revised Laws of 1910, section 8418.

**Oregon**—Lord's Oregon Laws, section 7348; as amended by Laws of 1913, chapter 39, page 72.

**South Dakota**—Compiled Laws of 1913, section 3401.

**Utah**—Compiled Laws of 1907, sections 2826, 2828.

**Washington**—Remington's 1915 Code, sections 1341, 1364.

**Wyoming**—Compiled Statutes of 1910, sections 3137, 5727; Laws of 1915, chapter 4, page 4.

#### § 18. Illegitimate children to inherit in certain events.

Every illegitimate child is an heir of the person, who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the

legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.—*Kerr's Cyc. Civ. Code*, § 1387.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 597.
- Arizona—Revised Statutes of 1913, paragraph 1104.
- Colorado—Mills's Statutes of 1912, sections 7844, 7845.
- Hawaii—Revised Laws of 1915, section 3248.
- Idaho\*—Compiled Statutes of 1919, section 7794.
- Kansas—General Statutes of 1915, sections 3845, 3846.
- Montana\*—Revised Codes of 1907, section 4821.
- Nevada—Revised Laws of 1912, section 6117.
- New Mexico—Statutes of 1915, sections 1851, 1852.
- North Dakota\*—Compiled Laws of 1913, section 5745.
- Oklahoma\*—Revised Laws of 1910, section 8420.
- Oregon—Lord's Oregon Laws, section 7351.
- South Dakota\*—Compiled Laws of 1913, section 3403.
- Utah—Compiled Laws of 1907, section 2833.
- Washington—Remington's 1915 Code, section 1345.
- Wyoming—Compiled Statutes of 1910, sections 5731, 5732.

#### § 19. Succession to property of illegitimate child.

The estate of an illegitimate child, who has been legitimated by the subsequent marriage of its parents, or adopted by the father as provided by section two hundred and thirty, and who dies intestate, is succeeded to as if he were born in lawful wedlock. If such child has not been so legitimated or adopted, his estate goes to his lawful issue, or, if he leaves no issue, to his mother, or in case of her decease, to her heirs at law—*Kerr's Cyc. Civ. Code*, § 1388.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska—Compiled Laws of 1913, section 598.
- Colorado—Mills's Statutes of 1912, section 7847.

Hawaii—Revised Laws of 1915, section 3249.  
 Idaho—Compiled Statutes of 1919, section 7795.  
 Kansas—General Statutes of 1915, section 3847.  
 Montana—Revised Codes of 1907, section 4822.  
 Nevada—Revised Laws of 1912, section 6118.  
 North Dakota—Compiled Laws of 1913, section 5746.  
 Oklahoma—Revised Laws of 1910, section 8421.  
 Oregon—Lord's Oregon Laws, section 7352.  
 South Dakota—Compiled Laws of 1913, section 3404.  
 Utah—Compiled Laws of 1907, section 2834.  
 Washington—Remington's 1915 Code, section 1346.  
 Wyoming—Compiled Statutes of 1910, section 5733.

#### § 20. Degree of kindred, how computed.

The degree of kindred is established by the number of generations, and each generation is called a degree.—*Kerr's Cyc. Civ. Code*, § 1389.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 599.  
 Idaho—Compiled Statutes of 1919, section 7796.  
 Montana\*—Revised Codes of 1907, section 4823.  
 Nevada—Revised Laws of 1912, section 6119.  
 New Mexico—Statutes of 1915, section 1854.  
 North Dakota\*—Compiled Laws of 1913, section 5747.  
 Oklahoma\*—Revised Laws of 1910, section 8422.  
 Oregon—Lord's Oregon Laws, section 7353.  
 South Dakota\*—Compiled Laws of 1913, section 3405.  
 Utah\*—Compiled Laws of 1907, section 2835.  
 Washington—Remington's 1915 Code, section 1347.

#### § 21. Same. Collateral line.

The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity.—*Kerr's Cyc. Civ. Code*, § 1390.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 599.  
 Montana\*—Revised Codes of 1907, section 4824.

New Mexico—Statutes of 1915, section 1855.  
 North Dakota—Compiled Laws of 1913, section 5748.  
 Oklahoma\*—Revised Laws of 1910, section 8423.  
 Oregon—Lord's Oregon Laws, section 7353.  
 South Dakota\*—Compiled Laws of 1913, section 3406.  
 Utah\*—Compiled Laws of 1907, section 2836.  
 Washington—Remington's 1915 Code, section 1347.

**§ 22. Same. Ascending and descending direct line.**

The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestors with those who descend from him. The second is that which connects a person with those from whom he descends.—*Kerr's Cyc. Civ. Code*, § 1391.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 599.  
 Montana\*—Revised Codes of 1907, section 4825.  
 North Dakota\*—Compiled Laws of 1913, section 5749.  
 Oklahoma\*—Revised Laws of 1910, section 8424.  
 Oregon—Lord's Oregon Laws, section 7353.  
 South Dakota\*—Compiled Laws of 1913, section 3407.  
 Utah\*—Compiled Laws of 1907, section 2837.  
 Washington—Remington's 1915 Code, section 1347.

**§ 23. Same. Degrees in direct line.**

In the direct line there are as many degrees as there are generations. Thus, the son is, with regard to the father, in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons.—*Kerr's Cyc. Civ. Code*, § 1392.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 599.  
 Montana\*—Revised Codes of 1907, section 4826.  
 New Mexico—Statutes of 1915, section 1854.  
 North Dakota\*—Compiled Laws of 1913, section 5750.  
 Oklahoma\*—Revised Laws of 1910, section 8425.  
 Oregon—Lord's Oregon Laws, section 7353.  
 South Dakota\*—Compiled Laws of 1913, section 3408.  
 Utah\*—Compiled Laws of 1907, section 2838.  
 Washington—Remington's 1915 Code, section 1347.

**§ 24. Same. Degrees in collateral line.**

In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins german in the fourth, and so on.—*Kerr's Cyc. Civ. Code*, § 1393.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 599.
- Montana\*—Revised Codes of 1907, section 4827.
- New Mexico—Statutes of 1915, section 1855.
- North Dakota\*—Compiled Laws of 1913, section 5751.
- Oklahoma\*—Revised Laws of 1910, section 8426.
- Oregon—Lord's Oregon Laws, section 7353.
- South Dakota\*—Compiled Laws of 1913, section 3409.
- Utah\*—Compiled Laws of 1907, section 2839.
- Washington—Remington's 1915 Code, section 1347.

**§ 25. Relatives of the half blood.**

Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.—*Kerr's Cyc. Civ. Code*, § 1394.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 599.
- Arizona—Revised Statutes of 1913, paragraph 1095.
- Colorado—Mills's Statutes of 1912, section 7840.
- Hawaii—Revised Laws of 1915, section 3250.
- Idaho—Compiled Statutes of 1919, section 7796.
- Kansas—General Statutes of 1915, section 3851.
- Montana\*—Revised Codes of 1907, section 4828.
- Nevada—Revised Laws of 1912, section 6119.
- North Dakota\*—Compiled Laws of 1913, section 5752.
- Oklahoma\*—Revised Laws of 1910, section 8427.
- Oregon—Lord's Oregon Laws, section 7353.
- South Dakota\*—Compiled Laws of 1913, section 3410.

Utah\*—Compiled Laws of 1907, section 2840.

Washington—Remington's 1915 Code, section 1347.

Wyoming—Compiled Statutes of 1910, section 5729.

**§ 26. Advancements are part of distributive share.**

Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other heir, is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by such child, or other heir, toward his share of the estate of the decedent.—*Kerr's Cyc. Civ. Code*, § 1395.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 600.

Arizona—Revised Statutes of 1913, paragraph 1098.

Colorado—Mills's Statutes of 1912, section 7841.

Hawaii—Revised Laws of 1915, sections 3252, 3254.

Idaho—Compiled Statutes of 1919, section 7797.

Kansas—General Statutes of 1915, section 3848.

Montana—Revised Codes of 1907, section 4829.

Nevada—Revised Laws of 1912, section 6120.

North Dakota—Compiled Laws of 1913, section 5753.

Oklahoma—Revised Laws of 1910, section 8428.

Oregon—Lord's Oregon Laws, section 7354.

South Dakota—Compiled Laws of 1913, section 3411.

Utah—Compiled Laws of 1907, section 2841.

Washington—Remington's 1915 Code, section 1348.

**§ 27. Advancements, when too much, or not enough.**

If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.—*Kerr's Cyc. Civ. Code*, § 1396.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 601.

Arizona—Revised Statutes of 1913, paragraph 1098.

Colorado—Mills's Statutes of 1912, section 7841.  
 Idaho\*—Compiled Statutes of 1919, section 7798.  
 Kansas—General Statutes of 1915, section 3849.  
 Montana\*—Revised Codes of 1907, section 4830.  
 Nevada\*—Revised Laws of 1912, section 6121.  
 North Dakota\*—Compiled Laws of 1913, section 5754.  
 Oklahoma\*—Revised Laws of 1910, section 8429.  
 Oregon—Lord's Oregon Laws, section 7355.  
 South Dakota\*—Compiled Laws of 1913, section 3412.  
 Utah\*—Compiled Laws of 1907, section 2842.  
 Washington\*—Remington's 1915 Code, section 1349.  
 Wyoming—Compiled Statutes of 1910, section 5708.

#### § 28. What are advancements.

All gifts and grants are made as advancements, if expressed in the gift or grant to be so made; or if charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir.—*Kerr's Cyc. Civ. Code*, § 1397.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 603.  
 Arizona—Revised Statutes of 1913, paragraph 1098.  
 Colorado—Mills's Statutes of 1912, section 7842.  
 Hawaii—Revised Laws of 1915, sections 3252, 3254.  
 Idaho\*—Compiled Statutes of 1919, section 7799.  
 Montana\*—Revised Codes of 1907, section 4831.  
 Nevada—Revised Laws of 1912, section 6122.  
 North Dakota\*—Compiled Laws of 1913, section 5755.  
 Oklahoma\*—Revised Laws of 1910, section 8430.  
 Oregon—Lord's Oregon Laws, section 7357.  
 South Dakota\*—Compiled Laws of 1913, section 3413.  
 Utah\*—Compiled Laws of 1907, section 2843.  
 Washington\*—Remington's 1915 Code, section 1351.

#### § 29. Value of advancements, how determined.

If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.—*Kerr's Cyc. Civ. Code*, § 1398.



**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 604.  
 Arizona—Revised Statutes of 1913, paragraph 1098.  
 Colorado—Mills's Statutes of 1912, section 7841.  
 Hawaii—Revised Laws of 1915, section 3253.  
 Idaho\*—Compiled Statutes of 1919, section 7800.  
 Montana\*—Revised Codes of 1907, section 4832.  
 Nevada\*—Revised Laws of 1912, section 6123.  
 North Dakota\*—Compiled Laws of 1913, section 5756.  
 Oklahoma\*—Revised Laws of 1910, section 8431.  
 Oregon—Lord's Oregon Laws, section 7358.  
 South Dakota\*—Compiled Laws of 1913, section 3414.  
 Utah\*—Compiled Laws of 1907, section 2844.  
 Washington\*—Remington's 1915 Code, section 1352.

**§ 30. When heir who received advancement dies before decedent.**

If any child, or other heir receiving advancement, dies before the decedent, leaving heirs, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.—*Kerr's Cyc. Civ. Code*, § 1399.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 605.  
 Arizona—Revised Statutes of 1913, paragraph 1098.  
 Colorado—Mills's Statutes of 1912, section 7841.  
 Idaho—Compiled Statutes of 1919, section 7801.  
 Montana—Revised Codes of 1907, section 4833.  
 Nevada—Revised Laws of 1912, section 6124.  
 North Dakota—Compiled Laws of 1913, section 5757.  
 Oklahoma—Revised Laws of 1910, section 8432.  
 Oregon—Lord's Oregon Laws, section 7359.  
 South Dakota\*—Compiled Laws of 1913, section 3415.  
 Utah—Compiled Laws of 1907, section 2845.  
 Washington—Remington's 1915 Code, section 1353.

**§ 31. Inheritance of husband and wife from each other.**

The provisions of the preceding sections of this title, as to the inheritance of the husband and wife from each

other, apply only to the separate property of the decedents.—*Kerr's Cyc. Civ. Code*, § 1400.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Idaho—Compiled Statutes of 1919, section 7802. .

Kansas—General Statutes of 1915, section 3843.

Nevada\*—Revised Laws of 1912, section 6125.

#### § 32. Distribution of community property on death of wife.

Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.—*Kerr's Cyc. Civ. Code*, § 1401.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho—Compiled Statutes of 1919, section 7803.

New Mexico—Statutes of 1915, section 1840.

Washington—Remington's 1915 Code, section 1342.

NOTE.—An amendment to the above section, 1401 of the Civil Code, was a part of chapter 611 of the Statutes and Amendments of 1919, p. 1274, which whole chapter was suspended from going into effect by a compliance with the referendum provisions of the state constitution. The questions involved, including the section named, were defeated at the general election held on November 2, 1920. Such defeat, therefore, left the section as it read before the amendment to stand as the law in force relative to the matter.

#### § 33. Disposition of community property on death of husband.

Upon the death of the husband, one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his

descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.—*Kerr's Cyc. Civ. Code*, § 1402.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho—Compiled Statutes of 1919, section 7803.

Kansas—General Statutes of 1915, section 3840.

New Mexico—Statutes of 1915, section 1841.

Washington—Remington's 1915 Code, section 1342.

#### § 33.<sup>1</sup> Share of surviving spouse in community property is exempt from inheritance tax, etc.

This section, 1402a, added to the Civil Code, was a part of chapter 611 of the Statutes and Amendments of 1919. It was inadvertently printed herein when this book went to press, it having been at that time suspended from going into effect by the referendum provisions of the state constitution. It was defeated at the general election held on November 2, 1920, and, of course, should not be here, but the headline is preserved, partly for the purpose of showing the nature of the act.

#### § 34. Inheritance by representation.

Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.—*Kerr's Cyc. Civ. Code*, § 1403.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 607.  
 Colorado—Mills's Statutes of 1912, section 7839.  
 Hawaii—Revised Laws of 1915, section 3251.  
 Kansas—General Statutes of 1915, section 3852.  
 Idaho\*—Compiled Statutes of 1919, section 7804.  
 Montana\*—Revised Codes of 1907, section 4834.  
 Nevada—Revised Laws of 1912, section 6129.  
 North Dakota\*—Compiled Laws of 1913, section 5758.  
 Oklahoma\*—Revised Laws of 1910, section 8433.  
 Oregon—Lord's Oregon Laws, section 7361.  
 South Dakota\*—Compiled Laws of 1913, section 3416.  
 Utah\*—Compiled Laws of 1907, section 2846.  
 Washington—Remington's 1915 Code, section 1355.  
 Wyoming—Compiled Statutes of 1910, section 5728.

**§ 35. Inheritance by aliens.**

Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.—*Kerr's Cyc. Civ. Code*, § 1404.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 1105; Laws of 1917, chapter 43, page 57.  
 Colorado—Mills's Statutes of 1912, section 7843.  
 Idaho\*—Compiled Statutes of 1919, section 7805.  
 Kansas—General Statutes of 1915, section 121.  
 Montana\*—Revised Codes of 1907, section 4835.  
 North Dakota—Compiled Laws of 1913, section 5759.  
 Oklahoma—Revised Laws of 1910, section 8434.  
 Oregon—Lord's Oregon Laws, section 7172.  
 South Dakota—Compiled Laws of 1913, section 3417.  
 Utah—Compiled Laws of 1907, section 2847.  
 Washington—Remington's 1915 Code, section 8775.  
 Wyoming—Compiled Statutes of 1910, section 5730.

**§ 36. Aliens inheriting must claim within five years.**

If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in title eight, part three, Code of Civil Procedure.—*Kerr's Cyc. Civ. Code*, § 672.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 1105; Laws of 1917, chapter 43, page 56.

Colorado—Mills's Statutes of 1912, section 7843.

Idaho—Compiled Statutes of 1919, section 7805.

Montana—Revised Codes of 1907, section 4835.

**§ 37. Successor is liable for decedent's obligations.**

Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by the Code of Civil Procedure.—*Kerr's Cyc. Civ. Code*, § 1408.

**§ 38. Convicted murderer of decedent not to succeed.**

No person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate; but the portion thereof to which he would otherwise be entitled to succeed descends to the other persons entitled thereto under the provisions of this title.—*Kerr's Cyc. Civ. Code*, § 1409.

**LAW OF SUCCESSION.****1. Taking by descent.**

- (1) In general.
- (2) Succession.
- (3) Heirs take, how.
- (4) Statutory provisions.
- (5) Passing of title.
- (6) Deflection of descent.
- (7) Computing degrees of kindred.

**2. What property descends.**

- (1) In general.
- (2) Community property.
- (3) Homesteads.
- (4) Timber-culture claims.
- (5) Mining claims.

**3. Rights of widow.**

- (1) In general.
- (2) As a survivor.
- (3) Under agreements.
- (4) Election to take under will.

**4. Children's right of inheritance.**

- (1) In general.
- (2) Statutory constructions.
- (3) Grandchildren.
- (4) Child en ventre sa mere.
- (5) Pretermitted child.
- (6) Heirs of half blood.

**5. Descent on death of unmarried minor.****6. Inheritance by adopted children.**

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| 7. Descent to parents.                      | (18) Inheritance by or through illegitimate Indian children.          |
| (1) In general.                             | (19) What law governs.  |
| (2) Descent to father.                      | 13. Taking by contract, agreement, or family settlement.              |
| (3) Descent to mother.                      | 14. Repudiation of will and taking under the statute.                 |
| 8. Descent to grandparents.                 | 15. Inheritance by or through illegitimate children.                  |
| 9. Who can not inherit.                     | (1) Right of. Acknowledgment.   |
| 10. Inheritance by convict.                 | (2) Succession to estate of illegitimate not acknowledged or adopted. |
| 11. Inheritance by aliens.                  | (3) Sufficiency of acknowledgment. Evidence of recognition.           |
| 12. Inheritance by Indians.                 | (4) Presumption as to legitimacy.                                     |
| (1) In general.                             | (5) Illegitimacy, how inferred.                                       |
| (2) Estates and title.                      | (6) Construction of Utah statute.                                     |
| (3) Taking by inheritance.                  | (7) Right of non-resident alien.                                      |
| (4) Five Civilized Tribes.                  | (8) Pretermitted illegitimate child.                                  |
| (5) Under the Creek law.                    | 16. Construction of statutes.   |
| (6) Same. Substitution of laws of Arkansas. | (1) In general.   |
| (7) Same. Course of descent.                | (2) Divorce decrees.  |
| (8) Same. Creek freedmen.                   | 17. What law governs.   |
| (9) Osage Indians.                          |   |
| (10) Choctaw Indians.                       |   |
| (11) Seminoles.                             |   |
| (12) Cherokees.                             |   |
| (13) Peoria Indians.                        |   |
| (14) Chickasaws.                            |   |
| (15) Muscogees.                             |   |
| (16) State law governs since statehood.     |   |
| (17) Indian marriages.                      |   |

#### 1. Taking by descent.

(1) In general. The term "succession" is used in place of the words "descent and distribution," in some of the codes, to denote the transmission of the property of a decedent by operation of law.—Estate of Headen, 52 Cal. 294, 298. The word "succeed" refers to persons who take property by operation of law; that is, by descent, by succession.—Estate of Wakefield, 136 Cal. 110, 112, 68 Pac. 499. The heirs of decedent, whether lineal or collateral, take their distributive share of the estate subject to all existing equities in favor of the estate against them personally, and against any of those through whom they inherit.—Head v. Spler, 66 Kan. 386, 71 Pac. 833. While it is true that the descent is cast and the property of the decedent vested in the devisees and legatees, or in the heirs, at the moment of the death of the deceased, it is also true that they take the property subject to the payment of the expenses of administration, and subject to the charges which the law fixes upon it for the support, maintenance, and comfort of the widow and family of the deceased, and subject to the liability to have these charges enforced by orders of the court made without notice in pursuance of the statute; and the enforcement of these charges in the authorized mode is not a violation of any constitutional right of the heir, devisee, or legatee.—Estate of Bump, 152 Cal. 274, 92 Pac. 643, 644. Under the statutes of Washington, which provide that if the decedent leaves no issue, or husband or wife, and no father or mother, or brother or sister, the estate must go to the next of kin in equal degree, first

cousins are preferred to second cousins.—*In re Sullivan's Estate*, 48 Wash. 631, 94 Pac. 483, 486, 95 Pac. 71. Where the intestate leaves no wife and no issue, and his parents are both dead, one-half of the estate goes to the heirs of the deceased father, and the other half to the heirs of the deceased mother.—*Russell v. Hallett*, 23 Kan. 276, 280; *Sparks v. Bodensick*, 72 Kan. 5, 82 Pac. 463. If a wife, being the owner of certain land, dies intestate, and leaves as her only heirs her husband and several grandchildren, the offspring of her daughter by a former marriage, the surviving husband inherits a one-half interest in said land and the grandchildren the other half-interest.—*Oliver v. Sample*, 72 Kan. 582, 84 Pac. 138. The intent of a statute which provides that an intestate's property shall descend to the surviving husband or wife, and to the intestate's descendants in specified proportions, and, in case of no issue, to the surviving husband or wife and father in equal shares, and, if no issue, or husband, or wife, or father, then in equal shares to the brothers and sisters of the intestate, is, that one-half of the property shall descend and be distributed, subject to the payment of debts, to the surviving husband or wife, and the other half to the intestate's brothers and sisters, and to the children of any deceased brother or sister by right of representation, provided, if the intestate shall leave a mother, she shall share equally with the brothers and sisters.—*In re Foley's Estate*, 24 Nev. 197, 51 Pac. 834, 837. The Kansas statute excluding strangers to the blood from the line of descent is not unconstitutional with respect to the forms of its enactment.—*Andrews v. Harron*, 59 Kan. 771, 51 Pac. 885, 886. In Colorado the lands of an intestate descend to the heirs, and not to the administrator. The title vests immediately in the heirs, and the administrator has no control over, or right, title, or interest in, the lands, except the power to harvest growing crops, and lease, mortgage, or sell in certain contingencies, and under proper order of the court having probate jurisdiction.—*Rupp v. Rupp*, 11 Colo. App. 36, 52 Pac. 290, 291. If the testator leaves no wife surviving him, nor any issue, except a pretermitted child, and there is nothing to show that the failure to mention the child was unintentional, such child takes the whole estate, in the same manner as though the testator had died intestate. In such a case there is no need for any apportionment, and the question of advancement becomes immaterial.—*Pearson v. Pearson*, 46 Cal. 609, 624. A native-born American citizen may claim property to which he has succeeded, at any time before a judgment or decree in a proper proceeding to escheat has been entered.—*Estate of Miner*, 143 Cal. 194, 76 Pac. 968, 970. The rules by which the descent of property is cast are subject to the will of the legislature.—*Oklahoma Land Co. v. Thomas (Okla.)*, 179 Pac. 937, 939. "The intestate laws of this state" concern the devolution of the estates of persons who died without disposing of their property by will; in other words, intestate laws deal with intestate estates, and provide for the passing of title to such person or persons as the lawmakers in their judgment and wisdom have

thought best entitled to such estates. The territory of Alaska is empowered to legislate on the subject of descent and distribution of property in cases of intestacy.—*United States v. Fish*, 5 Alaska 31, 33. Inasmuch as in the state of California all property real and personal descends to the heir subject only to the right of the personal representative to administer thereon, the rules of the common law system distinguishing between real and personal property in the matter of descent to the heirs do not apply in that state.—*Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732. The words "next of kin" mean those who inherit under the statute of descents and distributions.—*Bollinger v. Beacham*, 81 Kan. 752, 106 Pac. 1094. The right to inherit is dependent upon the will of the legislature, subject to constitutional restrictions.—*In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 793. An heir can be disinherited only by express devise or necessary implication.—*Love v. Walker*, 59 Or. 95, 115 Pac. 296. A release by an heir in the lifetime of the ancestor of his interest in the estate of the ancestor is inoperative under the South Dakota Civil Code, sections 215, 918, declaring that a mere expectancy of an heir apparent not coupled with an interest can not be transferred.—*In re Thompson's Estate*, 26 S. D. 546, 128 N. W. 1127. The rule in *Shelley's* case is not law in the territory of Hawaii.—*Estate of Holt*, 19 Haw. 78; *Rooke v. Queen's Hospital*, 12 Haw. 375, 389. The right to inherit, resting as it does upon public policy, is dependent entirely upon the will of the legislature, except so far as its power is restricted by constitutional provisions. Therefore, no one has the natural right to be the future heir of a living person.—*In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 793. The right of inheritance in the state of California is a matter entirely in the control of the legislature and depends wholly upon the provisions of the statutes, regardless of the court's notions of natural right and justice.—*Estate of Kirby*, 162 Cal. 91, Ann. Cas. 1913C, 928, 39 L. R. A. (N. S.) 1088, 121 Pac. 370, 375. The right to inherit is subject to legislative control.—*Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335. There exists, under the law in California, no inherent or natural right of inheritance, independent of our statute of succession.—*In re Watts' Estate*, 179 Cal. 20, 175 Pac. 415. The right of inheritance, with the rights and obligations springing therefrom, are purely matters of statutory regulation.—*In re Darling's Estate*, 173 Cal. 221, 159 Pac. 606. The word "heirs" is a technical term, used to designate the persons who would by the statute succeed to the real estate, or, in California, estate of any kind, in case of intestacy.—*In re Watts' Estate*, 179 Cal. 20, 175 Pac. 415. Where a wife wrongfully abandoned by her husband dies without having conveyed real property, the legal title to which the husband had placed in her, he succeeds to a third of the property.—*Somers v. Somers*, 27 S. D. 500, 36 L. R. A. (N. S.) 1024, 131 N. W. 1091.

## REFERENCES.

Who are entitled to succeed to estates of intestates.—See 12 Am. St. Rep. 82. Constitutionality of succession taxes.—See chapter on Inher-



itance Taxes, post. When and to what extent can a decree of divorce be attacked after the death of one of the parties.—125 Am. St. Rep. 230, 1 L. R. A. (N. S.), 57 L. R. A. 583. Decrees of consanguinity and affinity, how computed.—See note 56 Am. Dec. 293, 294; Kerr's Cal. Cyc. Civ. Code, §§ 1389-1393, and notes. Law governing descent and distribution.—See note 10 L. R. A. 766, 767. Succession to estate of intestates.—See note 12 Am. St. Rep. 81-113. Descent of title to personal property.—See note 112 Am. St. Rep. 727-729. Procedure where succession is not claimed.—See note Kerr's Cal. Cyc. Civ. Code, § 1405. Who are "next of kin."—See note 15 L. R. A. 300-304. Right to take property by inheritance or will as natural right protected by constitution.—See note 9 Am. & Eng. Ann. Cas. 726.

(2) Succession.—At common law, "descent," or "hereditary succession," is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law; an "heir" therefore, is he upon whom the law casts the estate immediately upon the death of the ancestor; and an estate, so descending to the heir, is called the "inheritance."—Moffett v. Conley (Okla.), 163 Pac. 118.

(3) Heirs take, how.—Real property of the decedent descends to the heir subject to the debts of the estate.—Stadelman v. Miner, 83 Or. 348, 155 Pac. 708, 163 Pac. 585, 983. If an adult heir dies without issue before his right of heirship is determined, his interest in the decedent's estate does not pass to the other heirs through the original probate proceedings; no statute authorizes the distribution of the estate of an adult person in and as a part of the estate of the deceased person from whom such adult person inherits.—In re Skelly's Estate; Skelly v. Skelly, 32 S. D. 381, 389, 143 N. W. 274. Rule that title vests in heir or devisee from moment of death held applicable to personalty as well as to realty.—Raulet v. Northwestern Nat. Ins. Co., 157 Cal. 213, 107 Pac. 292. At the death of an intestate his real property descends at once to his heirs subject only to the payment of his debts, and the statute of limitations commences to run against them as from the death of the ancestor.—Parker v. Belts, 47 Colo. 428, 107 Pac. 818. It is the general rule that the right of the heir to take, rests at once upon the death of the intestate and has been expressly recognized by the legislature of Montana, but the property of whatever kind it may be goes into the control of the district court and the possession of the administrator for the purposes of administration.—In re Colbert's Estate, 44 Mont. 259, 119 Pac. 793. Though the legal title to property may vest in the heirs immediately upon the death of the ancestor, it rests subject to administration and is not absolute until after the process of administration.—Bickford v. Stewart, 55 Wash. 278, 286, 34 L. R. A. (N. S.) 623, 104 Pac. 263, 106 Pac. 1115. Property vests in the heirs of the decedent dying intestate immediately upon the death of such decedent.—Winters v. Winters, 34 Nev. 324, 123 Pac. 17.

(4) **Statutory provisions.**—Under the Oregon statute, title to realty passes directly to the heirs as tenants in common subject to the administrator's possession to pay debts, but personalty goes to the administrator by operation of law.—*DeBon v. Wallenberg*, 52 Or. 404, 97 Pac. 717. Under statutory provisions and procedure in Nevada in relation to estates of deceased persons, the title to real estate vests in the heirs and devisees at the moment of the death of the testator or intestate, subject only to the lien of the executor or administrator for the payment of the debts and expenses of administration, with the right of possession until the settlement of the estate.—*Wren v. Dixon*, 40 Nev. 170, Ann. Cas. 1918D, 1064, 161 Pac. 722, 167 Pac. 324. As to the right of descent to "the next of kin in equal degree," it was intended by the legislature that the descent in such cases should be per capita, and not by representation.—*Estate of Nigro*, 172 Cal. 474, 156 Pac. 1019. Wherever the statute purports to furnish a full and complete scheme for the distribution of intestate property both real and personal, the rules of descent of the common law are excluded.—*Hawaiian Trust Co. v. Galbraith*, 22 Haw. 78, 84. Section 1845, Hawaiian Code of 1915, construed, and held to apply to the estate of an unmarried decedent, and that, under its terms and provisions, upon the death of an unmarried person, his estate goes to his parents, and if one of his parents be dead, the whole of it goes to the survivor.—*Harrison v. Harrison*, 21 N. M. 372, L. R. A. 1916E, 854, 155 Pac. 356, 360. The latter portion of section 1845 of the New Mexico Code of 1915, providing that if the intestate "leaves no wife," etc., applies to the estate of an unmarried decedent, and, under the terms and provisions of such statute, the estate of an unmarried person, upon his death, goes to his parents, and if one of his parents be dead, the whole of his estate goes to the survivor.—*Harrison v. Harrison*, 21 N. M. 372, L. R. A. 1916E, 854, 155 Pac. 356. The words "limited by marriage contract" occurring in Compiled Laws of 1907, § 2828, relating to succession in the absence of both a will and a marriage contract, refer to antenuptial contracts for conveying property or creating an incumbrance thereon.—*In re Schenk's Estate (Utah)*, 178 Pac. 344. Application of section 1386 of the Civil Code, as amended by Laws of 1907, chapter 297, page 567, relating to the succession to property undisposed of by will, belonging to the estate of a person who died leaving neither issue, husband, father, mother, brother, nor sister.—*Estate of Nigro*, 172 Cal. 474, 156 Pac. 1019.

(5) **Passing of title.**—The equitable title to the personal estate of an intestate descends at once to his heirs at law, subject only to the debts of the decedent. The legal title to the estate passes to the administrator, when appointed, for the purpose of enabling him to pay the debts due from the estate.—*Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574. The title to real property vests in the heir at the time of the decedent's death.—*In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945, 948. Real estate descends directly to the heirs of the deceased,

subject to the payment of his debts.—*Adams v. Slattery*, 36 Colo. 35, 85 Pac. 87, 88. The title to both real and personal property of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the probate court and to the possession of any administrator appointed by that court for the purpose of administration.—*Reed v. Stewart*, 12 Ida. 699, 87 Pac. 1002, 1003, 1152. The title to a decedent's land vests in the heirs at his death, subject only to such powers to order a sale in course of administration as are then possessed by the court; and these vested rights can not be impaired nor affected by subsequent legislation giving it a power of sale for new purposes different from and greater than those conferred by the law in force at the time of the death of the deceased.—*Estate of Newlove*, 142 Cal. 377, 75 Pac. 1083, 1084. In California the power and control of an administrator or executor over the property of a decedent is not as at common law, where it was almost absolute, especially in respect to personal effects; but the property in all assets of a deceased person passes to the heirs.—*Taylor v. Sanson*, 24 Cal. App. 515, 141 Pac. 1060. Title to real property vests at once, on the death of the owner, in his heirs or devisees and without an order of court; an executor takes no title to the real property of his testator, nor power over the same except under special circumstances and for a limited purpose.—*Estate of Kalena*, 24 Haw. 148, 151. On the death of a person intestate, the title to his property vests immediately in his heirs, and they can convey it immediately; so too his devisees when the person dies testate.—*Phelps v. Grady*, 168 Cal. 73, 141 Pac. 926. A decree of distribution, made by the superior court sitting in probate, merely determines the succession to such title as the decedent may have had, and does not determine that he had title.—*Rockey v. Vieux* (Cal.), 178 Pac. 712. The heir of an intestate obtains title by descent, and not through the process of the probate court; real property descends directly to him on the death of the ancestor "subject to his debts."—*Binswanger v. Henningsen*, 1 Alaska 509, 511. Descent or hereditary succession is the title whereby one acquires his ancestor's estate by right of representation as his heir.—*Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335. Title vests in heir or devisee from moment of death.—*Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 Pac. 292. There is no difference, under laws, between realty and personalty.—*Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 Pac. 292. Heirs take incorporeal hereditaments subject to all conditions affixed thereto.—*Payne v. Neuval*, 155 Cal. 46, 99 Pac. 476. The heirs at law of a deceased stockholder are liable in a suit upon a judgment rendered against the company after the stockholder's death to the extent of the property inherited by them.—*Douglass v. Loftus*, 85 Kan. 720, Ann. Cas. 1913A, 378, L. R. A. 1915B, 797, 119 Pac. 74. An heir has no interest in his ancestor's real property; but when the ancestor dies intestate that property descends at once to the heir.—*Wilson v. Channell*, 102 Kan. 793, 175 Pac. 95. Under the statute

relating to descent and distribution, the devisee of land becomes vested with the title thereof immediately on the death of the testator.—*Trimble v. Donahey*, 96 Wash. 677, 165 Pac. 1051. A woman who has gone through the marriage ceremony with a divorced man, without knowing that the marriage was void because contracted within six months of the divorce, may, nevertheless, be awarded one-half the man's estate on his death, if the two lived together in good faith and accumulated property, to which she had contributed.—*In re Brenchley's Estate*, 96 Wash. 223, L. R. A. 1917E, 968, 164 Pac. 913.

(6) **Deflection of descent.**—If a decedent dies intestate as to certain land, without widow or issue, or father, but does leave surviving him a mother, she becomes his sole heir, and the descent thus cast can not be deflected along any other line, except by will containing other terms of disposition. The mother, in such a case, can not be deprived of the estate by a provision in the testator's will leaving her a legacy, if the will contains no disposition of the testator's property to any one else.—*Andrews v. Harron*, 59 Kan. 771, 51 Pac. 885. Subdivision 8 of section 1386 of the Civil Code controls the succession to property left by a widow, which was the common property of herself and husband, although he devised all or a part thereof to her.—*Estate of Davidson*, 21 Cal. App. 118, 131 Pac. 67. Under section 1386, subdivision 5, and section 1393 of the California Civil Code a cousin once removed of a deceased person does not stand in the same degree of kinship as the nephews and nieces of the deceased and is not entitled with them to succeed to the estate.—*Estate of Moore*, 162 Cal. 324, 122 Pac. 844. Cousins inherit only through the parents of each and children can not inherit immediately from a cousin of their parent.—*Cramer v. McCann*, 83 Kan. 719, 37 L. R. A. (N. S.) 108, 112 Pac. 832. Cousins do not inherit immediately from each other, but only immediately through the parents of each, and children can not inherit immediately from a cousin of their parents.—*Cramer v. McCann*, 83 Kan. 719, 37 L. R. A. (N. S.) 108, 112 Pac. 832. Under subdivision 8 of section 1386 of the Civil Code, providing that property of a deceased widow who leaves no issue, which was the common property of herself and her deceased husband, shall go one-half to his kin, his surviving sister and nieces and nephews take such half, although he devised all the community property to his wife.—*Estate of Davidson*, 21 Cal. App. 118, 131 Pac. 67.

(7) **Computing degrees of kindred.**—Degrees of kindred are computed according to the rules of the civil law; and these rules are applicable to the anti-nepotism act.—*Barton v. Alexander*, 27 Ida. 286, Ann. Cas. 1917D, 729, 148 Pac. 471.

## 2. What property descends.

(1) **In general.**—An intestate's undisputed possession of real estate, with claim of ownership, up to the time of his death, gives him such a title as descends to his heirs.—*James v. Holanden*, 7 Kan. App. 811, 52 Pac. 913. So personal property of one who dies intestate passes

to the heirs of such intestate, subject to the control of the probate court and to the possession of any administrator appointed by the court for the purposes of administration.—*Litz v. Exchange Bank*, 15 Okla. 564, 83 Pac. 790. A settler upon the public lands of the United States may appropriate water and acquire a right to the use thereof upon such lands, and such right may be sold by him, or, in case of his death, the right descends to his heirs.—*Hall v. Blackman*, 8 Ida. 272, 68 Pac. 19. A water right for irrigation purposes is an easement and an incorporeal hereditament descendible by inheritance, and a freehold estate. It therefore comes within the meaning of the term "real property."—*Guthell Park Inv. Co. v. Town of Montclair*, 32 Colo. 420, 76 Pac. 1050, 1051. The right of enjoyment of possession of public land may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by regular sale to another.—*Grover v. Hawley*, 5 Cal. 485, 486. A claim of preference right of purchase of tide-lands from the state is a right which will descend to the purchaser's heirs and legal representatives as other property rights descend; and the heirs and legal representatives to whom the right descends may convey that right to another.—*Hotchkiss v. Bussell*, 46 Wash. 7, 89 Pac. 183, 185. A cause of action for a trespass or injury to land, occurring after the death of decedent, does not pass to the administrator or executor, but to the heir or devisee.—*Adams v. Slattery*, 36 Colo. 35, 85 Pac. 87, 89. Upon the death of defendant, in an action brought by the state for maintaining an alleged nuisance, by keeping a place where intoxicating liquors are unlawfully sold, the property used by him in the maintenance of the nuisance passes to his heirs, subject to the control of the county court and the possession of the administrator.—*State v. McMaster*, 13 N. D. 58, 99 N. W. 58. If a life estate in certain real property is devised to the widow, and, without making any devise of the remainder after the widow's death, a direction is made in the will that the proceeds be divided equally between four children, the entire interest therein is vested in the children by reason of their being the sole beneficiaries thereof. The effect of such direction is to convert the land into personalty, to take effect when the executor has power to make the sale. The rule of equitable conversion merely amounts to this: that, where it is mandatory to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will, for certain purposes, and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not. But, wherever the direction is for a future sale, up to the time fixed the land is governed by the law of real estate.—*Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020, 1021. Statutes which regulate the descent and distribution of real property are applicable to quartz-lodes.—*Carrhart v. Montana Min., etc., Co.*, 1 Mont. 245. 249. Personal property descends, under the laws of Kansas, to the heir the same as real property, with this exception that the

administrator must take possession of the personal property and use that property first for the payment of debts of the decedent; it is only in the event of a deficiency of this for such payment that the administrator may resort to a sale of the real property.—*Wilson v. Channell*, 102 Kan. 793, 175 Pac. 95. If a husband and wife have a deposit jointly in a savings bank, payable to either of them or to the survivor, as expressed in a statement to that effect signed by them, in their pass book, the wife is entitled to the same on the husband's death.—*Crowley v. Savings Union B. & T. Co.*, 30 Cal. App. 144, 157 Pac. 516.

(2) *Community property*.—Under a statute which provides that, upon the husband's death, one-half of the community property goes to the surviving wife, and that the other half is subject to the testamentary disposal of the husband, and in the absence of such disposition, goes to his descendants, and in the absence of both such disposition and descendants, is subject to distribution in the same manner as the separate property of the husband, the widow is not entitled to any portion of such other half, which must be distributed according to the common law.—*In re Clark's Estate*, 17 Nev. 124, 28 Pac. 238, 239. Under a statute which provides that, upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, a widow is not entitled to one-half by virtue of the statute, nor to any part of the other half which is otherwise disposed of by will, especially where she has, by virtue of the will, more than one-half of the whole estate.—*Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729, 733. It is a rule of property in the state of Washington that one-half of all the property purchased by a husband and wife with community funds descends to the heirs of the wife on her death.—*Warburton v. White*, 18 Wash. 511, 52 Pac. 233. Mining property acquired under the laws of the United States during coverture is community property; and all property acquired by the husband during coverture, except such as is acquired by gift, bequest, devise, or descent, is community property, although the wife may never have been a resident of the state.—*Jacobson v. Bunker Hill, etc., Co.*, 3 Ida. 126, 28 Pac. 396. A statute which provides that a testator shall be deemed intestate as to such of his children as are not provided for in his will applies to community property, as well as to his separate estate; and, where he is deemed intestate as to such children, parol evidence is not admissible to show that he had provided for such children otherwise than by his will.—*Hill v. Hill*, 7 Wash. 409, 35 Pac. 360. In the event of the death of the husband, his wife takes one-half of the community property as his heir.—*Estate of Moffitt*, 153 Cal. 359, 20 L. R. A. (N. S.) 207, 95 Pac. 653, 1025. Upon the husband's death, one-half of the community property goes to the surviving wife, and the other half is subject to his testamentary disposition, and in the absence of such disposition, goes to his descen-

dants. It can not be contended, with respect to such property, where there is a surviving wife and children, that the wife takes one-half absolutely and one-third of the remaining half as her own. It follows that her judgment creditor can enforce his judgment only against her interest in the estate.—*Estate of Angle*, 148 Cal. 102, 82 Pac. 668. The statutory provision relating to the descent of community property, must be read in connection with other sections relating to descent, one of which provides for ancillary administration where the property is part of the estate of a person dying a non-resident; the general rule prevails here that the succession to, and disposition of, and distribution of, personal property is controlled by the law of the domicile of the owner, or intestate, at the time of his death, without regard to where the property is located or where the owner died.—*Vansickle v. Hazeltine*, 29 Ida. 228, 158 Pac. 326. Section 1386 of the Civil Code of California, subdv. 8, relating to the disposition of community property, is a rule of succession in case of intestacy; it does not, however, limit, but fully recognizes, the right of the owner to dispose of the property therein described either by gift inter vivos, or by last will and testament.—*Wright v. Rohr* (Cal. App.), 182 Pac. 469, 470. The Idaho statute, concerning the devolution of community property, does not establish a rule contrary to the general law.—*Vansickle v. Hazeltine*, 29 Ida. 228, 158 Pac. 326. In the statute of descent, the legislature of Washington has enacted, in one section, that, in the absence of testamentary disposition, the share of community property pertaining to a deceased member of the community goes to such member's legitimate issue; and, though, in another section of the same act, it has defined the heritable powers of illegitimate children, the two sections have not been harmonized.—*Wasmund v. Wasmund*, 90 Wash. 274, 156 Pac. 3. Under the statute of Nevada, all of the community property, upon the death of one spouse intestate, goes to the surviving spouse.—*Kattenhorn's Estate*, In re, 41 Nev. 375, 383, 171 Pac. 164. Upon the dissolution of the community by the death of the husband or wife, intestate, the survivor became tenant in common with the decedent's heirs in respect to the community property as of the time of the death, if that took place prior to the amendment, of 1915, to the community property law.—*Ewald v. Hufton*, 31 Ida. 373, 173 Pac. 247. Construed with other statutes, in determining the right of an illegitimate child to inherit community property.—*Scott v. Scott*, 247 Fed. 976. The husband is, during his lifetime, the sole owner of the community property and entitled to its possession; and only on his death can the wife assert title to her community one-half.—*In re Dargie's Estate*; Appeal of Chapman (Cal.), 177 Pac. 165. The legislature of Nevada did not intend by the use of the phrase "goes to" the wife in section 2165, Revised Laws, and the phrase "belongs to" the husband in section 2164, that the interest of the wife in the community estate should vest only upon the death of the husband, since those sections were adopted under the authority of article IV, section 31 of the constitution requiring the legislature to pass laws defining the

rights of the wife to property held in common with, her husband, the word "held" importing ownership and not mere expectancy.—In re Williams' Estate, 40 Nev. 241, L. R. A. 1917C, 602, 161 Pac. 741, 746. The interest of the wife in the community property during the life of her husband is a property interest and not a mere expectancy, and does not pass by inheritance to her, and is not subject to taxation under the inheritance tax laws.—In re Williams' Estate, 40 Nev. 241, L. R. A. 1917C, 602, 161 Pac. 741, 742. The estate of the widow of an intestate, where the property was of the community sort, descends, on her own death intestate, to the heirs of both half and half.—In re Watt's Estate, 179 Cal. 20, 175 Pac. 415. A widow who otherwise would be entitled, as holder of a community interest, to part of the estate left by her husband, is not entitled to such in case the parties had separated finally long before the death and at the time of doing so had formally signed a written instrument whereby specific property rights were agreed by the husband to be settled upon her immediately, and she, in consideration thereof, relinquished her community rights.—In re Sloan's Estate (Cal.), 177 Pac. 150. Section 158 of the Civil Code gives binding effect to a written agreement between husband and wife, on separation, whereby their community property is divided, and all rights of each in respect to what the other may have at death are relinquished; provided the instrument be aptly expressed and validly executed.—In re Sloan's Estate (Cal.), 177 Pac. 150.

## REFERENCES.

Distribution of common property on death of husband.—See note Kerr's Cal. Cyc. Civ. Code, § 1402. Distribution of common property on death of wife.—See note Kerr's Cal. Cyc. Civ. Code, § 1401.

(3) Homesteads.—The title to a homestead does not descend to the widow and children of a deceased owner, who may occupy the land at the time of his death, to the exclusion of other heirs, who may reside elsewhere, but it descends in the same manner as the title to other real estate, subject only to the right of occupancy of the widow and children residing there, until the widow remarries, or the children all become of age.—*Mitchell v. Mitchell*, 69 Kan. 441, 77 Pac. 98. Where the estate is solvent and out of debt, the value of such part of the homestead as may be set aside to the widow should be deducted from her distributive share provided for by statute. She can not have both, unless such design on the part of the testator clearly appears from the will.—In re Little, 22 Utah 204, 61 Pac. 899. If a married man makes a homestead entry on a certain quarter-section of land while his wife is living, but she dies before final proofs are made and the patent issued, and the husband afterwards acquires the legal title, the children take as heirs of their mother.—*Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005, 1006. The descent of a homestead, on the father's death, to his children, subject to a life estate in the widow, is not unconstitutional as class legislation, as it operates



upon persons uniformly throughout the state.—*Holmes v. Mason*, 80 Neb. 448, 114 N. W. 606, 608. It seems to be the policy of the law to guard homestead rights for the benefit of the entryman himself, and in case of his death before patent, for the benefit of his heirs. Whatever rights survive the death of the homesteader belong to the heirs, and not to the estate of the deceased. The heirs do not succeed to such rights by inheritance, but by virtue of the law, which merely grants to them preference rights. If they fail to exercise those rights, or if there are no heirs capable, as citizens of the United States, of succeeding to such rights, then there is no one else to whom any preference right survives, and the land is open, as a part of the public domain, for occupancy by any qualified homesteader. The administrator, as such, succeeds to no rights in the homestead, for the reason that these are reserved for the heirs, and the law does not invest the administrator with any rights therein, simply because there are no heirs.—*Towner v. Rodegeb*, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50. Before a homesteader has earned a right to a patent, he has no such interest in the land as will make it a part of his estate on his death. The patent thereafter issued to the persons specified in the Federal statute is issued to them, not as heirs of the decedent, who have inherited his title, but as original parties, who are preferred by the Federal statute, after the rights of the original homesteader have been destroyed by death; they being allowed the benefit of his residence upon the land.—*Gjerstadenjen v. Van Duzen*, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233. If a homestead has not been selected from community property, but from the property of the wife, it descends, upon her death, to her heirs, and if there be more than one child, as where there are two children and a surviving husband, one-third of it is succeeded to by the husband, and the remaining two-thirds in equal shares by the children, as provided in the statute governing succession.—*Beck v. Soward*, 76 Cal. 527, 531, 18 Pac. 650. The legislature of Washington intended to vest title to a decedent's estate in the heirs subject to existing laws and to the right of the surviving spouse to assert a homestead out of the property.—*Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659. On the death of a homestead entryman before the time when a patent might be demanded, all his rights under the entry cease, and his heirs become entitled to a patent, not because of having succeeded to an equitable interest, but because the law gives them a preference as new homesteaders, allowing them the benefit of the residence of their ancestor on the land.—*Harris v. Lyon*, 16 Ariz. 35, 38, 140 Pac. 985. If a person files upon public land as a homestead and dies before the accrual of his right to demand a patent he leaves no interest in the land susceptible of transmission to his heirs.—*Harris v. Lyon*, 16 Ariz. 35, 38, 140 Pac. 985. If a widow, having a minor child, makes a homestead entry, then takes a second husband and thereafter dies before the arrival of the time for demanding a patent, the federal land laws and the decisions

of the federal courts construing them bind the state courts in any controversy between the minor and the widower as to which shall have the preference as a new homesteader. *Harris v. Lyon*, 16 Ariz. 35, 39, 140 Pac. 985. When a father of a family deeds property to his wife, and the latter declares a homestead on the same and then dies, no estoppel arises to prevent his asserting an absolute title to this property; such an estoppel is always founded on a wrong done and on the inequity of permitting the wrongdoer to take advantage of it to the injury of another, relying and entitled to rely upon the wrongdoer's conduct.—*Williams v. Williams*, 170 Cal. 625, 151 Pac. 10. If a wife declares a homestead on her separate property it becomes vested absolutely in the husband if he survives her.—*Williams v. Williams*, 170 Cal. 625, 151 Pac. 10.

## REFERENCES.

Succession to rights of homesteader on his death before perfection of title.—Ann. Cas. 1912C, 696.

(4) *Timber-culture claims.*—It is settled beyond dispute that the heirs of a timber-culture entryman upon public lands of the United States, who dies before completing the period of occupancy and receiving the patent, succeed to all his rights, and, upon making the required proof, take title as direct grantees and purchasers from the government, and not by inheritance.—*Gould v. Tucker*, 20 S. D. 226, 105 N. W. 624, 625. Even though the administrator of the estate of a deceased entryman uses money belonging to the estate to commute the entry by payment of the required amount to the United States, all rights under the patent inure to the heirs as if their names had been specially mentioned therein, and neither the administrator nor the probate court has authority to sell the land to satisfy debts previously created, or to burden the same with any part of the expense incurred in securing the patent.—*Gould v. Tucker*, 20 S. D. 226, 105 N. W. 624, 625. Upon the death of a timber-culture claimant, before performance by him of the conditions precedent to obtaining title from the government, his heirs succeed to the claim, and may obtain a patent therefor in their own name by proof of full performance by them and their ancestor of the required conditions. But, in such case, they take directly as donees of the government, and not by inheritance. Upon the death of the claimant, his interest, in the timber-culture claim absolutely terminates and is at an end, and his rights pass by direct grant to his heirs and substituted beneficiaries of the government. He has, at the time of his death, no interest which can be devised, or which will descend or pass to his heirs or personal representatives. Hence proceedings assuming jurisdiction over the claim, and authorizing its sale, are absolutely void for want of jurisdiction of the subject-matter. The claim at that time belongs to the heirs, in their own right, and such proceedings could have no more force and effect than if the court should assume to

order a sale by the administrator of any other property belonging to the heirs.—*Haun v. Martin*, 48 Or. 304, 86 Pac. 371, 372.

#### REFERENCES.

Jurisdiction of probate court as to descent of real property. See note post, on Jurisdiction of Courts.

(5) Mining claims.—If the holder of a mining claim, under a bona fide location, dies before the government has issued the patent, his interest may be made the subject of a probate sale and passes to the purchaser even though the patent be issued to the heirs.—*Wallace v. Hudson*, 170 Cal. 596, 150 Pac. 988. The interest of the holder of a mining claim, under a bona fide location, is not in all respects similar to that which arises under a desert entry, a pre-emption claim, and the like; it is an estate of inheritance, and, on his death, passes by descent to his heirs, as does any other real estate.—*Wallace v. Hudson*, 170 Cal. 596, 150 Pac. 988.

#### REFERENCES.

Descent of unpatented mining claim.—See note 4 L. R. A. (N. S.) 919, 920.

#### 8. Rights of widow.

(1) In general.—A wife is not a "relative" of her husband, so that, under a will containing a devise to her, she dying first, her heirs succeed to the estate as she would have done had she lived. Upon her death preceding that of her husband, the devise would lapse.—In re *Renton's Estate*, 10 Wash. 533, 39 Pac. 145, 146. The Colorado statute expressly provides that a widow or surviving wife of a husband dying intestate is heir to one-half of his real estate, if there be a child or children living, and is also entitled to one-half of the personalty, but if there are no children, or descendants of any child, she becomes the sole heir at law. She is therefore entitled to share in the proceeds of a policy of insurance payable to her husband's "legal heirs."—*Anderson v. Groseback*, 26 Colo. 3, 55 Pac. 1086, 1090. A widow has no interest in, and is not entitled to, a distributive share of land owned by the deceased husband during marriage, and which is not a homestead, where the same was sold before his death upon a special execution or order of sale issued in pursuance of a judgment in an action to recover upon a note executed by the husband, and to foreclose a mortgage given to secure its payment, notwithstanding that she did not join in executing the note or mortgage, and was not a party to the foreclosure action.—*Mosteller v. Gorrell*, 41 Kan. 392, 21 Pac. 232. If a woman claims property as the wife of a decedent, and she makes affidavit that the decedent had deserted her after marriage, in a foreign country, some sixteen years prior to the time of his death, and that she believed that after he had deserted her he came to this country, she can not recover, where there is no evidence of that fact, and evidence of the identity of

the deceased as her husband is wholly lacking.—*Goldwater v. Burnside*, 22 Wash. 215, 60 Pac. 409, 410. A widow is an "heir."—*Thurston v. Allen*, 8 Haw. 392, 404. If a man dies intestate and without leaving issue, his common law wife is entitled to administer on his estate and to succeed to all his property.—*Estate of Matteote*, 59 Colo. 566, 151 Pac. 448. A deceased person's widow is entitled to her community interest after the payment of debts and costs of administration, but she is not entitled to possession until the administration has been closed.—*Enos v. Hamblen*, 79 Wash. 583, 140 Pac. 675. The rights of a widow and of those who claim under her are as potent where she survives her husband only one hour as they would be if she survived him for a number of years.—*Beeson v. Lotz*, 101 Kan. 399, 166 Pac. 466. The widow, where she and her husband were united by a common law marriage, is, in the absence of issue, entitled to the entire inheritance.—*Estate of Matteote*, 59 Colo. 566, 151 Pac. 448. The statute of Idaho makes the widow and children heirs, where property was the separate estate of the intestate; but it makes the widow sole heir if the decedent's estate was community property.—*Powell v. Powell*, 22 Ida 531, 535, 126 Pac. 1058. A wife may be the sole heir of her husband.—*Marcellus v. Wright*, 51 Mont. 559, 154 Pac. 714. Under no circumstances does the "surviving widow" of a deceased brother of a deceased husband of a deceased take directly from such deceased under § 1386, Civil Code of California.—*In re Ross' Estate* (Cal.), 182 Pac. 755, 758. If a married man die intestate, there must be surviving a brother or sister and neither issue, father, nor mother, in order that his nephews and nieces shall share with the widow in his property.—*Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315. If a man hold a deed for land, purchased by his son, but for which he has advanced to the son part of the purchase money, it being agreed orally that he shall so hold until repayment, the widow of the man has, on his dying before repayment other than his son's services for many years, no interest in the land.—*Scholz v. Hoth*, 94 Kan. 205, 146 Pac. 339.

## REFERENCES.

Right to contest the validity of a divorce decree after the death of one or both of the parties.—See notes 125 Am. St. Rep. 230, 57 L. R. A. 583, 1 L. R. A. (N. S.) 551.

(2) As a survivor.—A deed which conveys an estate to a husband and wife conveys it in entirety, and upon the death of one, the other is entitled, as a survivor of the two, to the entire estate.—*Baker v. Stewart*, 40 Kan. 442 10 Am. St. Rep. 213, 2 L. R. A. 434, 19 Pac. 904, 906. Proceeds of an insurance policy on life of decedent are separate property in which the widow has a right of dower.—*Burdett v. Burdett*, 26 Okla. 416, 35 L. R. A. (N. S.) 964, 109 Pac. 922. Any right of inheritance from her husband that a widow has is derived solely from the statute to that effect.—*Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678. A widow acquires rights in respect to the property left by her

husband's dying intestate only through the law of descents and distribution.—*Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678. Where deceased died in 1877, leaving surviving him his wife and a daughter, the latter of whom died in 1901, unmarried and without issue, the widow by right of inheritance, under section 1386, Civil Code of California would be entitled to all the property of the decedent, in the absence of a will, or to the extent that the property was undisposed of thereby.—*In re Glann's Estate*, 177 Cal. 347, 170 Pac. 833. The one-half interest which the wife receives from the community property, upon the death of her husband, comes to her in her own right by reason of the death of the community agent and her survival of the dissolution of the community partnership.—*Kohny v. Dunbar*, 21 Ida. 256, 258, Ann. Cas. 1913D, 492, 39 L. R. A. (N. S.) 1107, 121 Pac. 544. Where an intestate dies in this state, without issue, and leaving his wife surviving under the statutes of the state, she takes all property left by him, situated in this state, acquired by the joint industry of herself and her deceased husband during coverture.—*In re Barnes' Estate (Barnes v. Barnes)*, 47 Okl. 117, 147 Pac. 504, 505.

#### REFERENCES.

Inheritance by wife.—See *Kerr's Cal. Cyc. Civ. Code*, § 1386, note 57.

(3) Under agreements.—Agreements between husband and wife, which are calculated to facilitate the securing of a divorce, are contrary to public policy, and void. Hence if a husband, by unfair means, secures his wife's signature to such a contract, in which she consents to take, as her share, a fractional part of the property of her husband on his death, she is not barred from her right of inheritance.—*Palmer v. Palmer*, 26 Utah 31, 99 Am. St. Rep. 820, 61 L. R. A. 641, 72 Pac. 3, 9. An antenuptial agreement providing that the property owned by either party shall, after marriage, remain the separate and distinct property of such owner; that neither shall have or exercise any right, title or estate in the property of the other; and that each may, at his or her option, dispose of such property by will or otherwise, except that the husband shall not, during the lifetime of the wife, so dispose of his property as to jeopardize or render nugatory a subsequent provision for her benefit, by which he agrees to furnish her proper and comfortable support so long as they live together as husband and wife, or in case she survives him, so long as she remains his widow,—does not exclude the widow from her right of inheritance in the husband's property, where they have lived together for thirty years, and the husband dies intestate.—*Rouse v. Rouse*, 76 Kan. 311, 91 Pac. 45. A validly executed agreement between husband and wife, on separating, which divides the property held by them at the time, and expresses an intention that each relinquish all right to what the other may have or hold thereafter, empowers the husband to substitute another's name for that of the wife in his life insurance policy as the beneficiary.—*In re Sloan's Estate (Cal.)*, 177 Pac. 150. An otherwise valid agreement

between husband and wife, on separation, dividing their property and providing for a reciprocal relinquishment of marital property rights, is not invalidated by a further provision, invalid in itself, tending to the facilitation of a divorce.—*In re Sloan's Estate* (Cal.), 177 Pac. 150. A wife who seeks to rescind an agreement, made on separating from her husband, disposing of property rights between them, must satisfy section 1691 of the Civil Code of California by restoring, or offering to restore, to her husband the provisions accepted by her under the agreement.—*In re Sloan's Estate* (Cal.), 177 Pac. 150.

(4) Election to take under will.—Where a will is deposited in the office of the probate judge by the testator, and, after his death, the will is produced in open court, opened, and read in the presence of the devisees of the real property described therein (one of the witnesses to the will, and another), and an entry is made upon the will, by the probate judge, of the election of the widow to take under the will, and that the will is admitted to probate, the property passes under the will, and does not descend to the heirs of the testator.—*Chandler v. Richardson*, 65 Kan. 152, 69 Pac. 168. Where a widow fails to elect whether she will accept under the will or under the law she is held to have elected to take under the statute of descents and distributions.—*Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074. Where a widow renounced a will and elected to take under the statute, leaving the estate in such a condition that the remaining provisions of the will could not be enforced consistently with the testator's intention, they were disregarded and the whole estate distributed according to the statute.—*Fennell v. Fennell*, 80 Kan. 730, 18 Ann. Cas. 471, 106 Pac. 1038. Where the language of the will manifests no intention on the part of the testator to dispose of his wife's community interest and makes a testamentary disposition for her in lieu of such interest no election by the widow is necessary.—*La Tourette v. La Tourette*, 15 Ariz. 200, Ann. Cas. 1915B, 70 137 Pac. 426, 430. Where a widow, without regard to the provisions of the will of her deceased husband, elects to take under the law of descents and distributions, such election does not render the will inoperative. As between other persons, the will will be enforced as near in accordance with the intention of the testator as it can be.—*Pittman v. Pittman*, 81 Kan. 643, 27 L. R. A. (N. S.) 602, 107 Pac. 235. Where a widow renounces the will of her husband and elects to take under the law and her portion as provided by the statute of descents and distributions is set aside to her, if the estate is then in such a condition that the remaining provisions of the will can not be enforced consistently with the intent of the testator, they will be disregarded and the remainder of the estate will be distributed under the statute of descents and distributions the same as if no will had been made.—*Fennell v. Fennell*, 80 Kan. 730, 18 Ann. Cas. 471, 106 Pac. 1038. Where a wife has given her consent to her husband's making a will, it is not necessary that she should be called upon after his death to make an election under the statute, although

she is not named as a beneficiary under the will.—*Hanson v. Hanson*, 81 Kan. 305, 105 Pac. 444. A widow provided for by her husband's will has the choice of two rights, one under the statutes of descents and distributions and one under the will; but she can not have both, except in cases where such is the purpose of the will. She may take either, but the election of one is a relinquishment of the other.—*Ashelford v. Chapman*, 81 Kan. 312, 105 Pac. 534. The widow's election is between will and no will. If she takes under the statute, there is no will as to her, and none of her rights can be abridged as to any of its provisions. Her share is carved out of the estate according to law, precisely as if no will had been made. Then the will operates upon the residue.—*Ashelford v. Chapman*, 81 Kan. 312, 105 Pac. 534. Where a will leaves part of the testator's property undisposed of, the widow, by electing to take under it, debars herself and her heirs from having any of that part.—*Compton v. Akers*, 96 Kan. 229, Ann. Cas. 1918B, 983, L. R. A. 1917D, 758, 150 Pac. 219. The refusal of a widow to take under her husband's will and her election to take rather under the statute should not effect the carrying out of the provisions of the will otherwise, but conditions should be adjusted to her election and administration under the will proceeded with.—*Allen v. Patee*, 104 Kan. 440, 179 Pac. 333. Power given by a will to executors, to convert real estate into money and to distribute the proceeds among the widow and heirs, is destroyed by an election by such beneficiaries to take the property in kind.—*Estate of Loyd*, 175 Cal. 699, 167 Pac. 157. The Colorado statute, dealing with the question of consent and election of husband or wife as to taking under the will or the statute, is not so to be construed that, where a married woman has died leaving a will that puts her husband to such an election, the court has no jurisdiction in the absence of the husband's election filed after probate and within six months thereafter.—*Whipple v. Wessels* (Colo.), 180 Pac. 309. Where a widow, her husband having by will provided for her elects to accept the provision, she thereby relinquishes the rights she has in the estate under operation of the statute.—*In re Osgood's Estate* (Utah), 173 Pac. 152. Though the widow accepts the provision of a will, giving her the use of all of the testator's property during her life, this does not waive her right, under this section, to insist upon the distribution to her of her share of property as to which the testator died intestate.—*Kaser v. Kaser*, 68 Or. 153, 162, 137 Pac. 187. Separate and community property were devised to wife, but the testator did not declare same to be in lieu of her community right. Held that the fact that the wife also claims the right to succeed one-half of certain other community property devised to others than herself does not preclude her from taking the property devised to her.—*Estate of Prager*, 166 Cal. 450, 137 Pac. 37.

#### 4. Children's right of inheritance.

(1) In general.—In 1868, the statute of New Mexico did not determine the rights of a child in the estate of its mother, where the father was

living. Such rights were determined by the Spanish law.—*Crary v. Field*, 9 N. M. 222, 50 Pac. 342, 344. The surviving husband is authorized by the civil law of Spain and Mexico to sell as much of the community property as may be necessary to pay the community debts, and, in the exercise of this right and discharge of this duty, any transfer of property made by him, be it personal or real, conveys a good title to his vendee, and the heirs are without authority to interfere with or restrain him in his action, as survivor, unless it shall appear that he is prostituting his power, and committing waste to their detriment.—*Crary v. Field*, 9 N. M. 222, 50 Pac. 342, 344. A deceased person, in his lifetime, was married three times. By his first wife he had one child. By his second wife he had one child. By his third wife, surviving him, he had five children. He died intestate in Kansas. It was held that, at his death, one-half in value of his real estate, not necessary for the payment of his debts, descended in fee-simple to his widow; that the other half of his real estate descended to his seven children equally, being all of his children by his three wives; and that, upon the death of his widow, her estate descended to her own children.—*Colgon v. Burleigh*, 52 Kan. 392, 34 Pac. 1050. If a widow dies intestate, leaving two children, one by each of two husbands, she has successively had, and her estate consists wholly of property that was owned separately by her last husband and conveyed to her by deed of gift, the estate descends to both children in equal shares, under the California statute.—*Estate of McKenna*, 168 Cal. 339, 143 Pac. 605. B. devised his real estate to his wife for life, and after death certain portions to his son; the will provided that if any devisee should die before the wife the share which would otherwise have fallen to such devisee should go to his heirs; the son mortgaged the property devised to him, after which he died prior to the death of the widow of testator, leaving surviving him children who are admitted to be his heirs: Held, that whatever estate the son took under the will terminated with his death and that his surviving children, as heirs, took free from any lien of the mortgage.—*Brede v. First Nat. Bank*, 23 Haw. 537. There is no natural right of succession in any one, not even in a child by birth; succession is a matter purely of public policy, and such policy is concerned with the well-being of an adopted child quite as much as with that of a child by birth.—*Scott v. Scott (Ida.)*, 247 Fed. 976, 979. Where decedent who had been twice married died, leaving a widow and child by the first marriage, and his property had been acquired by the joint industry of himself and the second wife, the child by the first marriage constituted issue within Comp. Laws. 1909, section 8985, relating to distribution of assets of estates.—*Schafer v. Ballou*, 35 Okl. 169, 128 Pac. 498. A testator who dies, leaving children, and by his will leaves all his property to his wife "to have and to hold the same during her natural life or to sell and convey the said property for the benefit of herself and her heirs," dies intestate so far as his children are concerned; the word "heirs" used in the will not being the equiva-



lent of "children" under the Oregon statute.—*Neal v. Davis*, 53 Or. 423, 99 Pac. 69, 101 Pac. 212. Upon the death of a wife one-half of the community property (a homestead) descends to the children, who become tenants in common.—*Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635; *Krieg v. Lewis*, 56 Wash. 196, 26 L. R. A. (N. S.) 1117, 105 Pac. 483. An heir can be disinherited only by express devise or necessary implication.—*Love v. Walker*, 59 Or. 95, 115 Pac. 302. A child of the former marriage would be entitled to her proper share according to the laws of succession, as to the estate of which her father died seised.—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

(2) **Statutory constructions.**—Upon the death intestate of a widow who had twice married, and who left surviving a child by each marriage, property which had once been the separate property of her last husband, and which he had conveyed to her by deed of gift, descends in equal shares to each of her children, in accordance with the provisions of subdivision 1 of section 1386 of the Civil Code.—*Estate of McKenna*, 168 Cal. 339, 143 Pac. 605. The code section (Civ. Code, § 1386) to the effect that the estate of a widow, dying without issue, shall, in case the property was the common property of her predeceased husband and herself, go in equal shares to the children of the husband, applies only to cases of intestacy.—*Estate of Wenks*, 171 Cal. 607, 154 Pac. 24. Under the rule established in California subdivision 3 of section 1386 of the Civil Code does not entitle the children or grandchildren of a deceased brother or sister to inherit from the ancestor unless a brother or sister survived him.—*Estate of Nigro*, 172 Cal. 474, 156 Pac. 1019. The effect of the act of 1905, amending subdivisions 4 and 2 of section 1386 of the Civil Code, is to enable children of a deceased brother or sister to inherit, regardless of whether there be or be not a surviving brother or sister.—*Estate of Jepson*, 174 Cal. 684, 164 Pac. 1. Under section 6895, *Wilson's Annotated Statutes of 1903*, children of a deceased brother of a decedent take their interest in the estate of the decedent directly from the latter and not through their father who predeceased decedent, and their right to their inherited interest in the estate is not affected by the acts of their father in reference to the property descended.—*Barnard v. Bilby* (Okl.), 171 Pac. 444, 445.

(3) **Grandchildren.**—Where the deceased at the time of her death left no husband, no issue, no father nor mother, and no brothers or sisters, but left as her sole kindred the son of a deceased brother, and various grandchildren of said brother, the son of that brother takes the whole estate to the exclusion of such grandchildren.—*Burns v. Tiffie*, 49 Okl. 262, 152 Pac. 368. "Children of any deceased brother or sister," in the statute relating to descents, where it sets out the line in a case in which neither issue, husband or wife, father, mother, brother nor sister survives the intestate, does not indicate the legislative intent to be that a deceased brother's or sister's grandchildren, etc., shall inherit under

the provision.—*In re Roberts' Estate*, 84 Wash. 163, 146 Pac. 398. The statute of Washington expressly provides for inheritance by the children of deceased brothers and sisters of the intestate, but makes no provision for the inheritance by grandchildren of such deceased brothers and sisters; such grandchildren can not, therefore, take by right of representation.—*In re Roberts' Estate*, 84 Wash. 163, 146 Pac. 398. The expression "children of any deceased brother or sister" has reference to the sons and daughters of such brother or sister; it does not include grandchildren or other remote descendants.—*Falter v. Walker*, 47 Okl. 527, 149 Pac. 1111; *Lowrey v. Le Flore*, 48 Okl. 235, Ann. Cas. 1918E, 1001, 149 Pac. 1112; *Burns v. Tiffie*, 49 Okl. 262, 152 Pac. 368. The term "children," with respect to parentage, means sons and daughters, of whatever age; it refers to the immediate offspring; it does not include grandchildren or more remote descendants, unless a strong case of intention or necessary implication requires it.—*Falter v. Walker*, 47 Okl. 527, 149 Pac. 1111; *Lowrey v. Le Flore*, 48 Okl. 235, Ann. Cas. 1918E, 1001, 149 Pac. 1112.

(4) *Child en ventre sa mere*.—A child, *en ventre sa mere* at the time of its father's death, is deemed to have been living at the time of such death, and has all the rights of inheritance conferred upon any living person.—*Haydon v. Normandin*, 55 Mont. 539, 179 Pac. 460.

(5) *Pretermitted child*.—Where a deceased father had been ordered by decree of court to pay a certain sum of money, from and after the date of the decree, for the support and maintenance of his child, it can not be contended, in the face of such monthly payments, that the omission to mention the child in his will was caused by, or was due to, inadvertance or mistake.—*In re McMillen's Estate*, 12 N. M. 31, 71 Pac. 1083, 1084. A clause of the testator's will, empowering the executrix to sell land to pay the testator's debts, does not operate to divest a child born after the making of the will of its title in the land devised, where the statute provides that every testator leaving a child born after the making of the will, not named nor provided for therein, shall be deemed to have died intestate as to such child.—*Worley v. Taylor*, 21 Or. 589, 28 Am. St. Rep. 771, 28 Pac. 903. In New Mexico, a child can be disinherited without being mentioned in a will, though it appears that the omission of its name occurred through inadvertance or mistake.—*In re McMillen's Estate*, 12 N. M. 31, 71 Pac. 1083. Under the statute of Washington, where a testator is deemed intestate as to such of his children as are not provided for by his will, parol evidence is not admissible to show that the testator had provided for his children otherwise than by his will.—*Hill v. Hill*, 7 Wash. 409, 35 Pac. 360. A testator's child, not mentioned in the will, inherits as though there was no will, and does not and can not take under the will.—*Estate of Loyd*, 175 Cal. 699, 167 Pac. 157.

(6) **Heirs of half blood.**—Where an intestate leaves, as his sole heirs, four brothers (or sisters), half-brothers (or sisters) who are children of his father, and half-brothers (or sisters) who are children of his mother, each full brother (or sister) inherits an equal share with each child of his father in the half of the estate descending through the father, and also, in addition thereto, an equal share with each child of his mother in the half of the estate descending through her; the provision of the statute that children of the half blood shall inherit equally with children of the full blood not having the effect to require that in the case stated all the children of either or both of intestate's parents shall receive equal parts of his estate.—*Tays v. Robinson*, 68 Kan. 53, 74 Pac. 623. The statute casting the descent of property uses the word "children," and the relation of parent and child determines inheritance. The divorce of parents does not affect this relation. No matter who may have a daughter's custody for the purposes of nurture, she is still the child of her father, and, by statute, children of the half blood inherit equally with those of the whole blood.—*McIntyre v. Gelvin*, 77 Kan. 779, 95 Pac. 389. Resident citizen half-sisters of a resident citizen who died intestate, leaving neither widow nor children, and whose parents both died before him, non-resident aliens, inherit immediately and directly the lands of the deceased in Kansas.—*State v. Ellis*, 72 Kan. 285, 83 Pac. 1045.

#### REFERENCES.

**Relatives of the half blood.**—See note *Kerr's Cal. Cyc. Civ. Code*, §§ 1386, 1394. **Inheritance by half blood.**—See note 61 *Am. Dec.* 655-667. **Descent and distribution among kindred of half blood.**—See notes, 29 *L. R. A.* 541-567, 26 *L. R. A. (N. S.)* 603.

5. **Descent on death of unmarried minor.**—If a minor daughter has inherited the proceeds of community property of her father and mother upon the death of her father, and dies without issue, and, not having been married, leaving surviving her a mother and her brothers, all of such property, personal as well as real, of the deceased child goes to her surviving brothers, and the mother takes no interest therein; but regard must be had to the source from which the property was derived in its distribution, and a separate personal estate must be distributed among the same persons as would be entitled to the real property.—*Fort v. West*, 14 Wash. 10, 44 Pac. 104, 106. The Oklahoma statute, relating to descent and distribution, provides, in the case of the death of a minor intestate, that the property shall descend "to the parent," if the parents are not living together, "having had the care of said deceased minor," and in applying the provision the estate should be divided between the parents, when the deceased was 18 years of age, and up to 21 months of his death had been under the care of both parents, who had lived together all that while; and it appears that a separation between husband and wife had then taken place and been maintained for a year, during which year all the children had

remained with the father, that the mother had then obtained a decree of divorce, had come home and taken charge of the family and the father had gone away, so that the deceased had been under the mother's sole care only nine months.—*Alberty v. Alberty*, (Okla.), 180 Pac. 370.

6. Inheritance by adopted children.—In a state having a statute regulating the adoption of children, the provisions thereof must be substantially followed, in order to clothe the adopted children with the right of inheritance.—*Renz v. Jury*, 57 Kan. 84, 45 Pac. 71, 72. The word "issue," in a statute prescribing a rule of inheritance, is used in the same sense as the word "child" and "children." So if an adopted child is, by virtue of its status, to be "regarded and treated in all respects as the child of the person adopting," and is to "have all the rights and be subject to all the duties of the legal relation of parent and child," the right to succeed to the estate of the deceased parent must be included.—*Estate of Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887, 888. The right of inheritance in such cases is fixed solely by the act itself. If a child is adopted by one parent, and not by another, the rights acquired by an adopted child would be simply rights in the estate of the adopting parent, and would leave the right of inheritance as to the non-adopting parent wholly unaffected by the act of adoption. Some cases hold that the right of inheritance extends only to the property of the parents who may die leaving property, and gives to the blood of the adopted child no such inheritable quality as to make the child a sister or brother of the children of the deceased parents with the ordinary right of inheritance which would proceed from that relationship.—*Webb v. Jackson*, 6 Colo. App. 211, 40 Pac. 467, 468. Where the adoption is under the statute of one state, and the parents ultimately remove to another, whose statutes of descent and distribution are dissimilar, the child can acquire no right in property which descends, and is to be distributed according to the law in force in place of the newly acquired residence.—*Webb v. Jackson*, 6 Colo. App. 211, 40 Pac. 467, 468. If a testator dies, leaving a will in which no reference is made to an adopted child, such child is entitled to share in the estate as if the testator had died intestate. But the failure to refer in the will to such child does not invalidate the will. The whole estate is subject to the debts and expenses of administration. When these are paid, the adopted child is entitled to have its proportionate share of the estate set over to it, and the remainder of the estate descends according to the terms of the will. The remedy of a child not provided for in a will is, simply to move the court to proceed with the administration of the estate of the mother, and, as a part of such administration, to decree and set over to such child the proportion to which it would be entitled if the testator had died intestate. If the administration of the estate has been properly set on foot by the probating of the will, it should continue until the estate is finally closed. The only effect that the failure to name the child in the will could have upon the proceedings would be to compel a determination thereof

without regard to any extension provided for by the terms of the will, and a distribution that, as to such child, should be uninfluenced by any of the provisions thereof.—*Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530, 532. Where the adoption of children is regulated by statute, as in Iowa and Kansas, rights of inheritance can only be acquired through adoption by a substantial compliance with the provisions of the statute.—*Renz v. Jury*, 57 Kan. 84, 45 Pac. 71. A child adopted in a sister state, in substantial compliance with her statutes, will inherit lands of the deceased adopting parent in Kansas, on equal terms with a child of such parent born in wedlock.—*Gray v. Holmes*, 57 Kan. 217, 33 L. R. A. 207, 45 Pac. 596. The heirs of an adopted daughter will inherit, through her, a share of the estate of the deceased adopting parent, just as if she were a daughter of such parent by blood.—*Gray v. Holmes*, 57 Kan. 217, 33 L. R. A. 207, 45 Pac. 596. A child by adoption can not inherit from its adoptive parent unless the act of adoption is in strict accordance with the statute.—*Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 3 L. R. A. 620, 20 Pac. 842. To establish heirship under acts providing for the adoption of children, the enactments must be looked to, to ascertain the rights of the claimants.—*Webb v. Jackson*, 6 Colo. App. 211, 40 Pac. 467, 468. An adopted child, under the statute of Idaho, has all the rights of succession of a natural child; "child" and "issue" both include the child by adoption as well as the child by birth; the law has expressly conferred upon an adopted child the legal status of an "issue"; hence, where there is no other issue and no testamentary disposition, an adopted child is entitled to inherit community property as if he were a child by birth.—*Scott v. Scott*, 247 Fed. 976. An adopted child of an intestate succeeds to his property as against collateral heirs. In re *Pepin's Estate* (*Pepin v. Meyer*), 53 Mont. 240, 250, 163 Pac. 104. An adopted child succeeds to the separate estate of its deceased foster parent equally with the natural child.—*Scott v. Scott* (Ida.), 247 Fed. 976, 979. A disposition of his property by a testator to his adopted daughter for life and after her death to her issue, vests the remainder in her heirs, if she dies without issue, and the testator left no issue himself.—*Franklin v. Fairbanks*, 99 Kan. 271, 161 Pac. 617. Where the statute declares that upon the death of a spouse, one-half of the community property shall go to the survivor, with the right of testamentary disposition, an adopted child is entitled, where there is no other issue and no testamentary disposition, to its deceased adoptive mother's half of the community estate.—*Scott v. Scott* (Ida.), 247 Fed. 976.

#### REFERENCES.

Inheritance by adopted children.—See note on "Adoption," subd. 15, ante, and *Kerr's Cal. Cyc. Civ. Code*, § 1386, note 2. Right of adopted children to inherit.—See note 118 Am. St. Rep. 684-688. Adopted child, right of, to inherit from persons other than adopting

parents.—See notes 4 Am. & Eng. Ann. Cas. 881, 9 Am. & Eng. Ann. Cas. 780.

#### 7. Descent to parents.

(1) *In general.*—Where the parents of a deceased minor had been separated one or two years at the time of the death of the minor, the parent who had the entire burden of parental duty, including maintenance as well as the custody of and personal attention to such minor, during the full period of that separation, takes all of the minor's estate.—*Bruce v. McIntosh*, 57 Okl. 774, 159 Pac. 261. In a case relative to the descent of the estate of a deceased minor, having no inheritable kin except parents who are not living together, and where the question as to the exclusive "care" of such minor during that period of separation and at the time of his death is in controversy, the parent in whose behalf sole heirship is claimed, must, under the statute of Oklahoma, be shown to have borne practically the entire burden of parental duty, including maintenance and such other expenses as that duty requires, toward the minor at the time of his death and during substantially the full period of such separation.—*Bruce v. McIntosh*, 57 Okl. 774, 159 Pac. 261. Under the statutes of this state, where a minor dies leaving estate and no issue and both parents survive him, but are not living together at the time of his death, and it appears that during their period of divorcement and separation each parent has contributed about the same toward the support of the minor, and each has borne about the same burden in caring for him, his estate in such case will descend to the parents in equal shares.—*Alberty v. Alberty* (Okla.), 180 Pac. 370.

(2) *Descent to father.*—Under the Kansas statute, when a child dies intestate, leaving no wife or issue, the whole of his estate goes to his father.—*Gray v. Holmes*, 57 Kan. 217, 33 L. R. A. 207, 45 Pac. 596. Where a husband and wife had a family of six children, three of whom died early, unmarried, and without issue, and where the mother, who was the owner of a tract of land, subsequently died intestate, and left surviving her the father and three children, it was held, in an action to determine the respective interests of the parties in the estate of the mother, that the surviving father was the sole heir of the children who died prior to the death of the mother, and that the shares which they would have taken, had they outlived the mother, descended to him, and therefore that the three living children were each entitled only to a one-twelfth portion of the estate.—*De Lashmutt v. Parrent*, 40 Kan. 641, 20 Pac. 504. If a woman dies, leaving surviving her husband and four minor children, and two of the children die under age, and unmarried, their interest in their mother's estate descends to their father. This is so under a statute which provides that if any person shall die seised of any real property, not having lawfully devised the same, if he leave no issue or wife, such real property shall descend to his father, and a statute which applies only in cases where the intestate has left one or more minor children, and the

issue of one or more deceased children, is inapplicable to the case.—*Stitt v. Bush*, 22 Or. 239; 29 Pac. 737, 738. In statutes of descent, the word "ancestor" means one from whom an estate is immediately inherited. So, if an estate comes to a father from his infant son, the son is the ancestor of his father.—*Estate of Ehu*, 9 Haw. 393, 394.

#### REFERENCES.

Inheritance by father.—See *Kerr's Cal. Cyc. Civ. Code*, §1386, note 44.

(3) Descent to mother.—On the death of a minor, who owns land, his mother is an heir and entitled to receive her share.—*Lamb v. Brammer*, 29 Ida. 770, 162 Pac. 246. Under a will where the death of the wife and child of the decedent was a condition precedent to the disposition to the brothers of such decedent, in view of the definition and effect of a condition precedent in sections 1346 and 1347, Civil Code of California, where the child survived the decedent, but predeceased the mother and brothers, the mother inherited the entire property.—*In re Glann's Estate*, 177 Cal. 347, 170 Pac. 833, 834.

8. Descent to grandparents.—The grandfather is one degree nearer of kin than the uncle, as computed by the civil law; and where an intestate has no issue, nor wife, father, mother, brother, nor sister, his grandfather takes the estate in preference to his uncle, as next of kin.—*Smallman v. Powell*, 18 Or. 367, 17 Am. St. Rep. 742, 23 Pac. 249. A son having died, leaving no child, wife, father, mother, sister, nor brother, nor issue of any brother or sister, it was held that the estate descended to his grandmother on his father's side, and his grandfather and grandmother on his mother's side, in equal shares to each.—*Shadden v. Hembree*, 17 Or. 14, 18 Pac. 572. Under the Colorado statute, the estate vests in the grandparents, if there are any, as one class, and if there are none, then in the uncles and aunts, collectively.—*Thatcher v. Thatcher*, 17 Colo. 404, 29 Pac. 800, 801.

9. Who can not inherit.—When a woman consents to become a plural wife, she does so at her peril, in so far as the law of inheritance is concerned. She is without the pale of the law of inheritance as to any property which her husband has acquired or may subsequently acquire; and if he sees fit to bequeath all of his property to another, she has no lawful right to complain.—*Raleigh v. Wells*, 29 Utah 217, 110 Am. St. Rep. 689, 81 Pac. 908, 910. In a jurisdiction where marriage between a white man and an Indian woman, either by ceremony, cohabitation, customs of the Indian tribe, or any other method, is null and void, a child of such persons, born during their relationship of pretended husband and wife, has no right of inheritance from the father.—*In re Walker's Estate*, 5 Ariz. 70, 46 Pac. 67. Where the statute provides that if a decedent leave a husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate shall go to the surviving husband or wife, it is a rule of property that the nieces and nephews of the decedent, who dies intestate, and who leaves surviving him a

widow, but neither father, mother, brother, nor sister, do not succeed to any portion of the estate of the deceased, and this rule will be adhered to.—*Estate of Nigro*, 149 Cal. 702, 87 Pac. 384. Succession to estates is purely a matter of statutory regulation, which can not be changed by courts.—*Ingram's Estate v. Clough*, 78 Cal. 586, 12 Am. St. Rep. 80, 21 Pac. 435. If a widow dies, leaving an estate acquired by descent, the children of her deceased husband, by a former wife, can not inherit under a statute which provides that "kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of blood of such ancestor must be excluded from such inheritance."—*Amy v. Amy*, 12 Utah 278, 42 Pac. 1121, 1132. Collateral kindred are not heirs of an estate where the decedent dies leaving a legitimate child.—*Caulk v. Lowe* (Okla.), 178 Pac. 101.

10. *Inheritance by convict.*—The right of inheritance is a civil rule, existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the commission of a crime. Hence if the statute declares that a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead, and he has been so sentenced, he can not inherit the estate of his father, where such person was serving a life sentence at the time of his father's death.—*Estate of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62, 58 Pac. 61. There is no doubt of the power of the legislature, by express language, to cast the descent of a convict's property, in the event of his civil death, on such persons as will be heirs at law in case of natural death; but a statute which provides that when a person shall be imprisoned under a sentence of imprisonment for life, his estate, property, and effects shall be administered and disposed of in all respects as if he were naturally dead, does not cast the descent of his property upon his heirs by the fact of such sentence and imprisonment.—*Smith v. Becker*, 62 Kan. 541, 53 L. R. A. 141, 64 Pac. 70. In the absence of express provision excluding the husband from inheriting from his wife, under the laws of descent and distribution of the Creek Nation, in force at the time of descent cast, the operation of said laws is not affected by the fact that the husband murdered his wife, but not for the purpose of at once obtaining the inheritance.—*De Graffenreid v. Iowa Land & T. Co.*, 20 Okla. 687, 95 Pac. 624. A person who has been convicted of the crime of manslaughter in killing the decedent is not deprived of his right of succession by reason of the provisions of section 1409 of the Civil Code providing that "no person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate"; the word murderer as used in such section has the technical meaning given it in the definition embodied in section 187 of the Penal Code.—*Estate of Kirby*, 162 Cal. 91, Ann Cas. 1913C, 928, 39 L. R. A. (N. S.) 1088, 121 Pac. 370. In the state of Kansas where a murderer is imprisoned



under a life sentence his estate is administered in all respects as though he were naturally dead.—*Dobbs v. Lilley*, 86 Kan. 513, 121 Pac. 505. A statute whereby a participant in the killing of another person forfeits all rights of inheritance from that person, does not violate sections 10 and 12 of the Bill of Rights, section 6 of article 6 of the state constitution, or the 14th amendment of the constitution of the United States.—*Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678. A conviction for manslaughter is a conviction for killing within contemplation of the statute providing in effect that a person convicted of killing another shall be denied all interest in the estate of the person killed.—*Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678. The statute providing, in effect, that a person convicted of killing another shall not inherit from the person killed does not work a forfeiture in violation of the state constitution and of the fourteenth amendment to the federal constitution.—*Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678. The law denying to an active participant in the killing of another person all right of inheritance in respect to that person's estate, denies such right to one the grade of whose crime in such a connection has been determined by a jury to be murder in the third degree.—*Hamblin v. Marchant*, 103 Kan. 508, 175 Pac. 678.

#### REFERENCES.

Person convicted of murder of decedent, not entitled to succeed.—See *Kerr's Cal. Civ. Code*, § 1409, and note. Descent to murderer.—See note 5 L. R. A. 344, 345. Homicide as affecting devolution of property.—See notes 3 L. R. A. 726-730, 39 L. R. A. (N. S.) 1088. Murderer, succession by, to property of victim.—See notes 2 Am. & Eng. Ann. Cas. 658, 7 Am. & Eng. Ann. Cas. 976.

11. Inheritance by aliens.—The constitution of Kansas, providing that "no distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property," made the statute of descents and distributions apply to aliens as well as to citizens, and enabled the former to inherit real property in such state.—*Spark v. Bodensick*, 72 Kan. 5, 82 Pac. 463. Under the constitution of Washington, aliens are entitled to inherit real estate in that state, from, by, or through ancestors, whether such ancestors be aliens or citizens. This being true, and the state having failed to forfeit the title of the alien by proceedings in the nature of office found, at any time prior to his death, the real estate owned by such alien at the time of his death descends to his alien heirs, who are authorized to receive the same and become entitled thereto, and the state thereupon loses its right to declare any escheat by forfeiture. Prior to the alien's death, the state may declare a forfeiture or escheat, but can not do so afterwards. Upon the death of the alien the real estate descends to his alien heirs.—*Abrams v. State*, 45 Wash. 327, 122 Am. St. Rep. 914, 13 Ann. Cas. 527, 9 L. R. A. (N. S.) 186, 88 Pac. 327, 332. Under a statute declaring that "any person, whether citizen or alien, may take, hold,

or dispose of property within this state," all aliens, whether residents or non-residents of this state, may take by descent as well as by purchase.—*Estate of Billings*, 65 Cal. 593, 594, 4 Pac. 639; *State v. Rogers*, 13 Cal. 159. Foreigners of the white race, or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of California, shall have the same rights, in respect to the acquisition, possession, enjoyment, transmission, and inheritance of all property, other than real estate, as native-born citizens; provided, that such aliens owning real estate at the time of the adoption of this amendment may remain such owners; and provided further, that the legislature may, by statute, provide for the disposition of real estate which shall hereafter be acquired by such aliens by descent or devise.—Cal. Const. 1879, art. I, § 17, amdt. Nov. 16, 1894. A statute which permits non-resident aliens to inherit real and personal estate is constitutional.—*State v. Rogers*, 13 Cal. 160. See *Kerr's Cal. Cyc. Civ. Code*, § 671. The legislature is not prohibited by § 17, art. I, of the California constitution of 1879 from extending the right of inheritance to non-resident aliens, as it has done by section 671 of the Civil Code of that state.—*Estate of Billings*, 65 Cal. 593, 595, 4 Pac. 639. Inasmuch as the right to inherit is dependent on the will of the legislature subject to constitutional restrictions, it is only by grace of the state in which the lands may be that they can be inherited by an alien or foreigner, and when a legislature confers such privileges it may qualify them with any conditions or burdens it chooses even after the right has vested, provided it does not deny due process of law.—*In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 793. A non-resident alien can not take by succession under section 5715, Revised Codes of Idaho, unless he appear and claim such succession within five years from the death of the decedent; but resident aliens take equally with citizens in all cases by succession.—*Connolly v. Probate Court*, 25 Ida. 35, 136 Pac. 210. Under the provisions of the alien land act of Kansas (chapter 3 of the Laws of 1891), resident citizens of the United States could not inherit lands in that state through the operation of the statute of descents and distributions, when they had to trace their descent through a cousin of their parents who was an alien at the time of his death.—*Cramer v. McCann*, 83 Kan. 719, 37 L. R. A. (N. S.) 108, 112 Pac. 832. Save as provided by statute, an alien has no right of inheritance.—*Moody v. Hagen*, 36 N. D. 471, 484, Ann. Cas. 1918A, 933, 162 N. W. 704. Testamentary laws and laws of inheritance, being matters reserved to the states, under our national arrangement, can not be made the subject of treaty rights.—*Moody v. Hagen*, 36 N. D. 471, 491, Ann. Cas. 1918A, 933, 162 N. W. 704. An alien can neither make an enforceable will nor take under a will, except as provided by statute.—*Moody v. Hagen*, 36 N. D. 471, 485, Ann. Cas. 1918A, 933, 162 N. W. 704. The state only can raise the question of an alien's claim, or title, to land on the ground of alienage. *Prentice v. How*, 84 Wash. 136, 146 Pac. 388.

## REFERENCES.

Aliens may inherit when, and how.—See note Kerr's Cal. Cyc. Civ. Code, §§ 672, 1404. Alien's right to inherit.—See note 31 L. R. A. 177-183. Rights of aliens to transmit or receive an inheritance.—See note 12 Am. St. Rep. 93. Effect of naturalization on alien's right to inherit.—See note 31 L. R. A. 181, 182. Effect of state statutes and constitutions upon inheritance through an alien.—See note 31 L. R. A. 146-158. Effect of state constitution and statutes upon inheritance by or from an alien.—See note 31 L. R. A. 85-107. Effect of treaties upon alien's right to inherit.—See notes 32 L. R. A. 177-189, L. R. A. 1915E, 327. Constitutionality of succession taxes.—See note post, on inheritance taxes, following table after § 1060.

## 12. Inheritance by Indians.

(1) In general.—The special act of congress of 1885, affecting none but the Umatilla reservation of Indians, and the confederated tribes inhabiting the same, and providing, among other things, "that the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided," was not affected by a subsequent act of congress providing that, for the purpose of determining the descent of land to the heirs of any deceased Indian, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, "the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child."—*McBean v. McBean*, 37 Or. 195, 61 Pac. 418, 421. In case of the death of the head of an Indian family, title to the decedent's property necessarily descends to some person, and where, under the terms of the treaty in pursuance of which a patent was issued, the President has not prescribed any rules or regulations to secure to the family the possession and enjoyment of such property, and there is no showing as to the customs of the tribe respecting such a matter, the court is compelled to follow the laws of descent of the state, provided they do not conflict with any of the terms of the treaty or patent, to secure such estate to the family.—*Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9, 12. Under the federal statute providing for the allotment of Indian lands, the laws of descent of the state apply to such land.—*Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9, 12. The descent of lands patented to a Shawnee Indian by the treaty of May 10, 1854, is to be determined by the law and rules established by the tribe.—*Hannon v. Taylor*, 57 Kan. 1, 45 Pac. 51. Where lands were granted to an Indian by a patent subject to forfeiture if the lands were abandoned and restricting the right of alienation for a certain period and until removed by legislative act and subsequently exercise of the power of alienation was provided

for, the determination of the question of heirship of a deceased allottee by the interior department is final and res adjudicata.—*Little Bill v. Swanson*, 64 Wash. 650, 117 Pac. 481.

(2) **Estates and title.**—In view of the act of May 27, 1908, a child born after March 4, 1906, the date specified in that act, did not, where the allottee was dead, have an estate for life in the allotment, but at most only an estate for years, defeasible during its term by her death, or by the removal of the restrictions on its alienation by the Secretary of the Interior.—*Parker v. Riley* (Okla.), 243 Fed. 42, 49, 155 C. C. A. 572. The grantee, under a trust patent to the heir of a deceased allottee of Indian lands, takes title not by inheritance from the deceased but by virtue of the federal statutes.—*Carlow v. Jordan*, 39 S. D. 28, 31, 162 N. W. 749.

(3) **Taking by inheritance.**—The heirs of a deceased member of the Creek Tribe of Indians, to whom patents have issued for lands allotted in his right, take title to such lands by inheritance.—*King v. Shults* (Okla.), 180 Pac. 550; *King v. Mitchell* (Okla.), 171 Pac. 725, 726. A citizen of the Creek nation in possession of lands in said nation who files thereon before the Commission to the Five Civilized Tribes under an act of congress approved June 28, 1898, and dies April 28, 1900, without receiving his certificate of allotment therefor, is seized of no estate of inheritance and courtesy therein does not attach.—*Sanders v. Sanders*, 28 Okla. 59, 117 Pac. 338. That provision of section 6 of the Creek Supplemental Agreement to the effect that the descent and distribution of land and money should be in accordance with the laws of Arkansas was, in effect, by sections 13 and 21 of the enabling act and section 2, article 25 of the constitution, and the provision substituted that only Creek citizens and their descendants should inherit the lands of the Creek Nation, and that if there were no person of Creek citizenship to inherit, the land should go to non-citizen heirs in the order named in the laws of Oklahoma.—*Thompson v. Cornelius*, 53 Okla. 85, 155 Pac. 602; *Jefferson v. Cook*, 53 Okla. 272, 155 Pac. 852; *Parnoski v. Lumkin* (Okla.), 163 Pac. 527; *Glasscock v. McDaniel* (Okla.), 175 Pac. 737. A full-blood Creek Indian woman died after enrollment on April 26, 1900, and her allotment was thereafter selected for her and patented to her heirs. Held that such heirs took title by inheritance and not by purchase.—*Chupco v. Chapman* (Okla.), 170 Pac. 259, 261.

(4) **Five Civilized Tribes.**—The act of congress of 1908 (35 Stat. 312) giving the Oklahoma probate courts jurisdiction of the persons and property of minor allottees of the Five Civilized Tribes, has reference, among other such property, to lands which such a minor has inherited from his father.—*Crow v. Hardridge* (Okla.), 175 Pac. 115. Section 6 of the act of congress of May 27, 1908 (ch. 199, 35 Stat. 312), subjecting the persons and estates of minor Indians to the jurisdiction of the probate court, applies as well to an allotment to a minor Indian as

to lands allotted to his ancestor and descending to him.—*Crow v. Hardridge* (Okla.), 175 Pac. 115. A conveyance by a full-blood Indian heir of any deceased allottee of the Five Civilized Tribes, is void, unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee, and, if not so approved, no rights are acquired under the deed by estoppel or otherwise; both the Indian grantor and his land being under the control of the government, the only way in which a valid conveyance can be made is to comply with the provisions of the statute of the United States.—*Okla. Oil Co. v. Bartlett* (Okla.), 236 Fed. 488, 494, 149 C. C. A. 540. The census card issued by the Dawes commission showed L. T., a member of the Five Civilized Tribes, to be the father of S. T., a deceased allottee. Held that evidence tending to establish that S. T. was an illegitimate child, introduced for the purpose of changing the descent from the putative father to the mother was competent.—*Mullen v. Short*, 38 Okla. 333, 133 Pac. 230. Where a Creek child was enrolled pursuant to the act of congress but died before allotment, land allotted to him by the Commission to the Five Civilized Tribes descends to his heirs, under the law of Arkansas, free from any restrictions upon alienation; the restrictions provided by section 16 of the Supplemental Creek Agreement attached only to allotments made to living citizens in their own right.—*Harris v. Bell* (Okla.), 235 Fed. 626.

(5) Under the Creek law.—As to descent and distribution under the laws of the Creek Nation, see *De Graffenreid v. Iowa Land & T. Co.*, 20 Okla. 687, 95 Pac. 624. The word "heirs," in the Creek law of descent and distribution, is construed to mean children.—*De Graffenreid v. Iowa Land & T. Co.*, 20 Okla. 687, 95 Pac. 624. Where lands were allotted to Creek Indians prior to the supplemental agreement made with the Creek nation, ratified in 1902, by act of congress approved June 30, 1902, after the death of such Indians, the Creek law of descents and distributions determines the heirs and their shares.—*Hooks v. Kennard*, 28 Okla. 457, 114 Pac. 744. The rights of daughters of Creek blood of a deceased Creek allottee under act of congress, June 30, 1902, section 6, are determined in the case of *Hughes Land Co. v. Bailey*, 30 Okla. 194, 120 Pac. 290. Lands of certain Indian allottees under section 28 of the original agreement of the Creeks ratified by act of congress March 1, 1901, which were allotted prior to the supplemental agreement ratified by act of congress June 30, 1902 (32 U. S. Stats. at Large, p. 500) descend under the Creek law of descents and distribution.—*Hooks v. Kennard*, 28 Okla. 457, 114 Pac. 744; *Lamb v. Baker*, 27 Okla. 739, 117 Pac. 189. The land allotted to a dead minor Creek freedman, who was living on April 1, 1899, and who died without issue, descends to his mother as his nearest relative.—*Irving v. Diamond*, 23 Okla. 325, 100 Pac. 557. The descent and distribution of the allotted lands of an enrolled Creek Indian who died before the ratification of the original Creek Treaty (Act March 1, 1901, Ch. 676, 31 Stats. 861) and who had during her lifetime allotted to her under section 11 of

the Curtis Act (Act June 28, 1898, Ch. 517, 30 Stats. 495) the use and occupancy of the surface of the allotment which was thereafter by section 6 of the original Creek Treaty ratified and deed issued to her heirs therefor, is, by reason of section 28 of the original Creek Treaty, regulated and controlled by the law of descent and distribution of the Creek nation.—*Barnett v. Way*, 29 Okla. 780, 119 Pac. 418. Under the laws of the Creek nation in force in February, 1902, an intermarried non-citizen husband of a citizen of the Creek Nation, who on said date died intestate, leaving brothers and sisters, but no father, mother, or children, is entitled to an undivided one-half of the allotted lands of his deceased wife, and to possession until such lands are distributed according to law under Act March 1, 1901, ch. 676, sec. 6, 31 Stats. 863, and Comp. Laws Creek Nation 1900, ch. 10, sec. 8.—*Bodle v. Shoenfelt*, 22 Okla. 94, 97 Pac. 556. Where a duly enrolled citizen of the Creek Nation died on August 16, 1899, at the age of two years, before receiving her allotment, leaving her surviving a father and a sister, born, not of the father but of the same mother, all citizens of the Creek Nation, it was held that the Creek law of descent and distribution governed the devolution of the allotment, and that the father as the "nearest relation" inherited the land in fee to the exclusion of the half-sister.—*Scott v. Jacobs*, 40 Okla. 522, 140 Pac. 148. Lands allotted in the name of a Creek citizen who died intestate and without issue, before receiving his allotment, descend to his heirs according to the laws of descent and distribution of the Creek Nation, and, where both parents are alive at the time of descent cast, are inherited by the mother, as the nearest relation to the exclusion of the father.—*Bigpond v. People's B. & T. Co.*, 52 Okla. 504, 505, 151 Pac. 849. Where non-citizen Creek allottee executes a will of her homestead, naming therein her husband as sole devisee, and dies leaving her surviving an only child by a former husband, born prior to the 25th day of May, 1901, such child is the sole heir of such allottee and is entitled to the whole of her estate as if she had died intestate, under the provisions of Sec. 6500, Mansf. Dig. (Ind. T. Ann. Stats. 1899, sec. 3572) relating to pretermitted children.—*In re Brown's Estate*, 22 Okla. 216, 97 Pac. 613. Where one of several children, born of a Creek mother and a non-Creek father, dies after receiving his or her allotment of lands of the Creek Nation, the surviving children, the mother being dead, inherit, because of the Creek blood, rather than the father who is not of that blood.—*Glasscock v. McDaniel* (Okla.), 175 Pac. 737. Where an allotment on behalf of a deceased Creek citizen was made under section 28 of the Original Creek Agreement in the name of the allottee, title vests in the heirs by operation of law.—*Jesse v. Chapman* (Okla.), 173 Pac. 1044, 1045. Where a citizen of the Creek Nation died intestate after receiving her allotment leaving her surviving her non-citizen husband and their child, a citizen of the Creek Nation, it is held, that, although allotted, the lands are still "lands of the Creek Nation" within the meaning of the Creek Supple-

mental Agreement.—*Thompson v. Cornelius*, 53 Okla. 85, 155 Pac. 602. The devolution of an allotment on behalf of a deceased Creek citizen, made, June 30, 1902, is governed by the Creek law of descent and distribution.—*Jesse v. Chapman* (Okla.), 173 Pac. 1044, 1045. The second proviso of section 6 of the supplemental Creek Treaty, was not repealed by the enabling act, nor by the constitution.—*McDonald v. Ralston* (Okla.), 166 Pac. 405, 407. A husband not a member of the Creek Nation may inherit land as his wife's heir under the Creek law of descent and distribution.—*Woodward v. De Graffenreid*, 36 Okla. 81, 131 Pac. 162. An allotment of a duly enrolled Creek Indian who died after receiving her patent, not being a "new acquisition," passed to her parents, who took title to the exclusion of her brothers and sisters.—*Pigeon v. Buck*, 38 Okla. 101, 131 Pac. 1083.

(6) Same. Substitution of laws of Arkansas.—The Indian appropriation bill, approved May 27, 1902 (32 U. S. Stats. 258, sec. 888), substituted the laws of descent and distribution of Arkansas for those of the Creek Nation provided for in the "Original Agreement," but it was not provided that such laws should become effective immediately. They did not take effect until July 1, 1902.—*De Graffenreid v. Iowa Land & T. Co.*, 20 Okla. 687, 95 Pac. 624. Under the laws existing in the Indian Territory at the time of the creation of the state (Mansf. Dig. sec. 2522 [Ind. T. Ann. Stats. 1899, sec. 1820]), the personal estate not disposed of nor otherwise limited by marriage settlement, when a person dies intestate, descends to be distributed in parcenary to his or her kindred, male and female, subject to the payment of his or her debts, etc., and where there are no debts and neither letters of administration applied for nor granted, the heirs may maintain an action to recover such personalty.—*First Nat. Bank of Muskogee v. Teirs*, 29 Okla. 714, 119 Pac. 218. Under the laws of Arkansas which were extended over the Indian Territory the only mode by which an illegitimate child could be made legitimate was by the marriage of the father and mother of such illegitimate child, and an acknowledgment by the said father that he was the father of such child.—*Rentle v. Rentle* (Okla.), 172 Pac. 1083, 1084. An allotment made by the Dawes Commission to the heirs of a deceased citizen of one of the tribes, passes as an ancestral estate under the laws of Arkansas in force in the Indian Territory.—*Sims v. Brown*, 46 Okla. 767, 149 Pac. 876, 877. Throughout the period when chapter 49 of the laws of Arkansas, relating to descents, prevailed, by congressional authority, in what has since become the state of Oklahoma, the death of a man without descendants, and leaving an ancestral estate, makes section 2531 of Mansfield's Digest apply, whereby in such cases the estate ascends according to the line through which it came.—*Whitener v. Moss* (Okla.), 175 Pac. 223.

(7) Same. Course of descent.—The course of descent of an allotment taken by a Creek Indian who died March 1, 1900, is determined under "original agreement" of May 27, 1901.—*Divine v. Harmon*, 30

Okla. 820, 121 Pac. 219. Under original Creek treaty the land of a Creek woman who died leaving a husband, a white man, and a daughter, descended as if the woman had died after the treaty was ratified.—*Merley v. Fewel*, 32 Okla. 452, 122 Pac. 700. Where a mixed-blood member of the Creek tribe of Indians died intestate, while an infant, and lands selected by an administrator were set apart to him as an allotment, and patent was issued conveying the land to the infant's heirs, such land was not a "new acquisition"; it came to the infant through the blood of his tribal parent, to wit, his father, in whom the fee simple title to said land passed.—*McDougal v. McKay*, 43 Okla. 251, 142 Pac. 987. Lands allotted under section 28 of the act of congress of March 1, 1901, in the name of a Creek citizen, who died intestate and without issue before receiving his allotment descend to his heirs according to the law of descent and distribution of the Creek Nation; and where the deceased left neither father nor mother nor brother nor sister, but left surviving him a brother of his mother and a brother and two sisters of his father, it is held that the mother's brother was the "nearest relation" within the meaning of the Creek law, and inherited the allotment to the exclusion of the paternal uncle and aunts.—*Haney v. Anderson* (Okla.), 178 Pac. 120, 121. Where a citizen of the Creek Nation died intestate after receiving her allotment, leaving her surviving her non-citizen husband, and their child, a citizen of the Creek Nation, the latter took the whole allotment of the mother to the exclusion of the non-citizen father, and that a purchaser of one-half thereof from the latter took no title.—*Thompson v. Cornelius*, 53 Okla. 85, 155 Pac. 602. The entire estate of a Creek citizen who died February 4, 1912, leaving surviving him a wife, who was a Creek citizen, but no issue and no father nor mother, nor brother, nor sister, is vested in such surviving wife.—*Hughes v. Bell*, 55 Okla. 555, 155 Pac. 604, 605. Lands allotted under section 28 of the act of congress of March 1, 1901, in the name of a Creek citizen who died intestate and without issue before receiving the allotment, descend to his heirs according to the law of descent and distribution of the Creek Nation; and where both parents are alive at the time of descent cast, such lands are inherited by the mother as the "nearest relation," to the exclusion of the father.—*Renfroe v. Olentine* (Okla.), 178 Pac. 119.

(8) *Same. Creek freedmen.*—Where a Creek freedman, duly enrolled as such, selected, filed upon, and was in possession of her allotment under the Curtis Act, and died before the adoption of the Original Creek Agreement, the fee did not vest in her, in her lifetime, but was vested in her heirs, by virtue of the provisions of the said agreement, and descended to them under the law of descent and distribution of the Creek Nation, under the provisions of that agreement.—*Warner v. Grayson*, 46 Okla. 622, 149 Pac. 235. The Creek citizen children and a grandchild of two brothers of a deceased Creek freedman, inherit the the allotted lands of the latter, the two brothers



being capable of inheriting if both were living and not barred by non-citizenship, and it is held that under the laws of descent and distribution of the state of Arkansas governing the inheritance, the living children take in their own right and the grandchild takes its deceased parent's interest by representation.—*Ross v. Wertz* (Okla.), 172 Pac. 968, 971. Where a duly enrolled Creek freedman died June 4, 1908, intestate, after receiving her allotment, leaving her surviving her father and brothers and sisters, all duly enrolled Creek citizens, but no issue nor husband, it is held that the father took the entire estate to the exclusion of the brothers and sisters, under the provisions of sections 8416, 8417, and 8418, Rev. Laws of 1910, and that the seventh subdivision of the last numbered section has no bearing on the case.—*Jefferson v. Cook*, 53 Okla. 272, 155 Pac. 852. The inheritance of lands allotted to a Creek Freedman, who died after the taking effect of the Creek Supplemental Agreement, and before statehood, is cast according to the laws of descent and distribution of the laws of Arkansas, as modified by section 6 of such agreement.—*Ross v. Wertz* (Okla.), 172 Pac. 968. Subject to dower or to title by curtesy consummate, the inheritance of the allotted lands of a Creek freedman, none of whose ancestors were of Creek blood or citizenship, who died intestate without issue in 1903, is cast upon the nearest kin of a common ancestral lineage who are Creek citizens or descendants of such; and in case of a failure of such kinsman, the surviving spouse, if a Creek citizen or descendant of such, may take; and in case of an entire failure of such kinsman or surviving spouse, the inheritance shall go to the non-citizen heirs in the order named in the laws of descent and distribution of the state of Arkansas.—*Ross v. Wertz* (Okla.), 172 Pac. 968. If a Creek freedman, none of whose ancestors were of Creek blood or citizenship died in 1903 intestate and without issue, the fact that kinsman who are themselves Creek citizens, must trace their kinship only through non-citizen blood, is not of itself a bar to inheriting the allotted lands of the decedent.—*Ross v. Wertz* (Okla.), 172 Pac. 968, 971. An infant Creek freedman who died unmarried, without issue, and intestate had an allotment selected for her. Her father was a Seminole and a non-member of the Creek nation. Held that by virtue of the provisions of section 7 and 8 of the supplemental Creek Treaty (Act June 30, 1902, ch. 1322, 32 Stats. 500) her allotment passed to the heirs of her mother to the exclusion of her father.—*Iowa Land and Trust Co. v. Dawson*, 37 Okla. 593, 134 Pac. 39. A duly enrolled Creek freedman, a minor, died July 2, 1899, without a surviving widow or children, his allotment not then having been selected. On August 15, 1902, his distributive share of land as a member of said tribe was allotted to his heirs. On April 8, 1905, his father and mother, who were his surviving heirs, executed a warranty deed covering said allotment. The grantee sold and gave possession of the land. The father and mother then brought suit for ejectment and possession. Held that the land passed to them free from restrictions; that same

was alienable when they sold it and that they could not maintain their action.—*Reutie v. McCoy*, 35 Okla. 77, 128 Pac. 244. Where a Creek freedman whose father was a Seminole was enrolled and an allotment selected to which patent was issued, held that under the supplemental Creek agreement, section 7, 8, the allotment passed to the heirs of the allottee's mother and that the devolution of the estate was governed by Mansf. Dig. Ark. ch. 40.—*Iowa Land and Trust Co. v. Dawson*, 37 Okla. 593, 134 Pac. 39.

(9) **Osage Indians.**—When a member of the Osage tribe of Indians dies before receiving his land allotment, and the patent is issued to his heirs—they also being members of the tribe—the heirs take the allotted lands free from restriction, and may convey them free from all restriction upon alienation except the mineral interests which are reserved to the tribe.—*Mongrain v. Aaron* (Okla.), 174 Pac. 755. Prior to the taking effect of the act of congress of June 28, 1906, a member of the Osage Tribe of Indians had no estate or interest in the lands and other property of the tribe to which her heirs would succeed at death.—*Simpkins v. Ware*, 45 Okla. 327, 145 Pac. 355, 356. Upon the death of an Osage Indian woman, who had been married more than once, and whose estate consists of lands and other property allotted and set aside to her under the act of congress of June 28, 1906, during coverture with a surviving husband, such husband succeeds to one-third of said estate.—*Simpkins v. Ware*, 45 Okla. 327, 145 Pac. 355, 356.

(10) **Choctaw Indians.**—Where a Choctaw Indian allottee, duly enrolled as such, died January, 1913, intestate, after receiving his allotment, leaving him surviving no father nor mother, but brothers and sisters of the whole blood and a brother and sister of the half blood, it is held that, under the provisions of sections 8417, 8418, and 8427, Rev. Laws, 1910, such Choctaw Indian died seised of an ancestral estate, and that the brothers and sisters of the whole blood are entitled to take the allotment to the exclusion of the brother and sister of the half blood.—*Hill v. Hill*, 58 Okla. 707, 708, 160 Pac. 1116. A minor Choctaw Indian died in September, 1905, before receiving his allotment, leaving surviving him his father, who was an enrolled Choctaw Indian, and his mother, a white woman; after the allotment it was held that the whole estate ascended to the Indian father to the exclusion of the white mother.—*Stalcup v. Mullen*, 49 Okla. 543, 153 Pac. 868. Where a Choctaw minor died October 6, 1910, unmarried and without issue, leaving her surviving her father and half brother, the devolution of her estate consisting of an allotment of land is governed by the second subdivision of section 8418, Rev. Laws, 1910, and, having survived her mother, her entire estate goes to her father and the seventh subdivision of said section has no application.—*Crouthamel v. Welch*, 53 Okla. 288, 156 Pac. 302. There is nothing in section 35 of the act of July 1, 1902, which affects the rule that where the allotment of a deceased member of the Choctaw Nation passed to both parents equally, if living or if dead, the share of such deceased parent

passed to his or her heirs, where the mother died prior to the closing of the tribal rolls on September 25, 1902, leaving a child capable of inheriting.—*Johnson v. Dunlap* (Okla.), 173 Pac. 359, 361. The allotment of a deceased member of the Choctaw Nation, who died in 1904 intestate and without issue, whose mother and father were Choctaw citizens by blood, is controlled in its devolution by the laws of descent and distribution of the state of Arkansas, so far as applicable; and where the allotment came through the blood of both parents, it ascends equally to the father and mother; and if either be dead the interest of the deceased parent passes to his or her heirs.—*Johnson v. Dunlap* (Okla.), 173 Pac. 359, 361. An allotment of a deceased member of the Choctaw Tribe, dying without issue, intestate, before statehood, whose father and mother were full-blood members of his tribe, ascends to the father and his heirs, and the mother and her heirs; and the mother of said allottee having died before him, said deceased allottee, leaving surviving him, as his sole heirs, his father and a brother, such father and brother succeed to his allotment in equal shares.—*Buck v. Simpson* (Okla.), 166 Pac. 146, 149. On the death of a one-sixteenth blood, enrolled member of the Choctaw Tribe of Indians, in August, 1907, without issue but survived by both parents and by brothers and sisters, her homestead and surplus lands theretofore allotted to her in what is now Choctaw County, Oklahoma, passed with fee simple title, as if by inheritance, to her parent or parents of the same tribal blood, and her brothers and sisters took no interest in the same, under the Arkansas statutes of descent and distribution then in force in the Indian Territory.—*Lovett v. Jeter*, 44 Okla. 511, 512, 145 Pac. 334. The allotment of an allottee of the Choctaw Tribe of Indians, enrolled as a half-blood, leaving surviving her a husband and two minor children, none of whom were members of the tribe, descended, under the laws of Arkansas, to said children in equal parts, subject to the right of the husband by curtesy consummate; and upon the death of one of said children in infancy his moiety was inherited by the other, upon whose death a few weeks later in 1907, its estate, being ancestral, ascended in the maternal line, whence it came, and passed to the nearest relative of the blood of its mother, regardless of the fact that they were not members of the tribe.—*Finley v. American Trust Co.*, 51 Okla. 489, 151 Pac. 865. Upon the death of mixed blood, minor children of the Choctaw Tribe of Indians, the fee in their allotments ascends to the parent of tribal blood, and not to the parent who has become a citizen of the tribe by virtue of an intermarriage.—*Gillum v. Anglin*, 44 Okla. 684, 687, 145 Pac. 1145.

(11) *Seminoles*.—Section 2 of the Seminole Agreement regulates the devolution of lands to which a duly enrolled Seminole citizen would have been entitled if living, where such citizen dies before receiving the same.—*Wadsworth v. Crump*, 53 Okla. 728, 157 Pac. 713, 714. Where a duly enrolled Seminole citizen dies before receiving his

allotment the lands to which he would have been entitled, if living, descend to his heirs who are themselves Seminole citizens under the laws of descent and distribution of the state of Arkansas, subject to the proviso contained in section 2 of the Seminole Agreement.—*Wadsworth v. Crump*, 53 Okla. 728, 157 Pac. 713, 714. Where a duly enrolled Seminole Indian died in 1901 before receiving his allotment leaving him surviving a widow and two daughters who had been enrolled as Creeks the daughters were heirs of their deceased father under section 2 of the Seminole Agreement, and inherited his lands to the exclusion of more distant relations, though enrolled as Seminoles.—*Wadsworth v. Crump*, 53 Okla. 728, 157 Pac. 713, 715. The primary allotment of an enrolled full-blood Seminole Indian, who died intestate and without descendants after having received her allotment, must be considered as an ancestral estate, within the meaning of the Laws of Arkansas, extended and put in force in the Seminole Nation by act of congress.—*Thorn v. Cone*, 47 Okla. 781, 150 Pac. 701. Seminole full-blood Indians acquire the right of their allotment by virtue of their membership in the Seminole Tribe of Indians, and their allotments come to them through their tribal parents, who are full-blood Seminole Indians.—*Thorn v. Cone*, 47 Okla. 781, 784, 150 Pac. 701. Section 2 of the act of congress of 1900 controls the descent of lands to which a duly enrolled member of the Seminole Tribe, who died after December 31, 1899, before receiving his allotment, is entitled; but that section has no application, and does not control the descent of land allotted to a member of tribe who died after said date, but who had received his allotment prior to his death.—*Dickinson v. Able* (Okla.), 176 Pac. 523, 524. Section 2 of the act of congress approved June 2, 1900, entitled, "An act to ratify an agreement between the Commission to the Five Civilized Tribes and the Seminole Tribe of Indians" (Act June 2, 1900, ch. 610, 31 Stats. 250), controls the descent of land to which a duly enrolled member of the Seminole tribe of Indians who died after the 31st of December, 1899, before receiving his allotment, is entitled; but said section has no application to and does not control the descent of land allotted to a member of said tribe of Indians who died after said date but who received his allotment prior to his death.—*Bruner v. Sanders*, 26 Okla. 673, 110 Pac. 730. The word "citizen," as used in section 2 of the Seminole Agreement, is not limited to persons whose names are found on the rolls prepared under section 1.—*Wadsworth v. Crump*, 53 Okla. 728, 157 Pac. 713, 714. The devolution of the allotments of full-blood Seminole Indians who died intestate, after receiving their allotments, on February 12, 1903, and July 20, 1904, is governed by the laws of Arkansas.—*Thorn v. Cone*, 47 Okla. 781, 782, 150 Pac. 701. Chapter 49 of the law of Arkansas (Mansf. Dig.) entitled "Descent and Distribution" controls the descent of land allotted to a member of the Seminole tribe of Indians not of Indian blood, who died after receiving his allotment.—*Heliker-Jarvis Seminole Co. v. Lincoln*, 33 Okla. 425,

126 Pac. 723. Citizenship in the Seminole Tribe did not necessarily extend to nor invest in the citizen a personal or individual interest in the common or undivided property of the tribe, but might exist independent of any right to participate in the distribution of tribal property.—*Wadsworth v. Crump*, 53 Okla. 728, 157 Pac. 713, 714. The allotments of two full-blood Seminole Indians, who died intestate and without descendants, after having received their allotments, on February 12, 1903, and July 20, 1904, respectively, ascend equally to the father and mother of such decedents and to their heirs.—*Thorn v. Cone*, 47 Okla. 781, 784, 150 Pac. 701. 'A duly enrolled Seminole freedman died in 1901 or 1902, after receiving his allotment, leaving surviving him a widow and daughter, who had been enrolled as Chickasaws. Held that the descent was cast under the laws of Arkansas, which were extended over the Indian Territory, and the question as to whether the widow and daughter are Seminole citizens is not involved in determining such descent.—*Rentle v. Rentle* (Okla.), 172 Pac. 1083, 1084.

(12) *Cherokees*.—The lands of a full-blood Cherokee Indian, who died after allotment in September, 1904, unmarried, intestate, and without issue, will be treated as an ancestral estate within the meaning of the laws of descent and distribution of the state of Arkansas in force at the time in the Indian Territory.—*Whitener v. Moss*, (Okla.), 175 Pac. 223. If both the parents of a deceased full-blood Cherokee Indian are of Cherokee blood, the estate of the deceased son ascends equally to the father and mother; and if the mother's death precedes that of her son, the moiety which she would have taken if living ascends to her heirs.—*Whitener v. Moss* (Okla.), 175 Pac. 223. On the death of a woman, a duly enrolled member and citizen of the Cherokee tribe, land that has been selected by and allotted to her as her distributive share of public lands of the tribe, descends to an only child, a daughter of full Cherokee blood and who enrolled as a member and citizen of the tribe, in fee, and a warranty deed executed by her and approved by the county court having jurisdiction of the estate passed title without any action by the Secretary of the Interior, though the deed was made after the enactment of section 9 of the act of congress of May 27, 1908.—*United States v. Knight* (Okla.), 206 Fed. 145, 147, 124 C. C. A. 211.

(13) *Peoria Indians*.—The heirs of a deceased member of the Peoria Tribe of Indians, in the Indian Territory, who died in 1906, inherited under the Arkansas law.—*Labadie v. Smith*, 41 Okla. 773, 140 Pac. 427. The Arkansas law governing descent and distribution was by act of congress extended to and put in force as to the estates of all tribes of Indians and all other persons, freedmen, or otherwise, in the Indian Territory, and the heirs of a deceased member of the Peoria tribe, who died in 1906, inherited under that law.—*Labadie v. Smith*, 41 Okla. 773, 140 Pac. 427.

(14) **Chickasaws.**—Where an enrolled quarter-blood Chickasaw Indian died in infancy without descendants prior to statehood, after receiving his allotment leaving surviving him his father, his mother having previously died, such allotment was an ancestral estate which came to him through the blood of his tribal parents, and as much through the blood of the mother as the father.—*Finley v. Thompson* (Okla.), 174 Pac. 535.

(15) **Muscogees.**—Under the provisions of the constitution and laws of the Muscogee Nation, a person claiming to be the offspring of a deceased male member of the Creek Nation must show that he was recognized by such male member, during his life, as his offspring, before he is entitled to inherit from said deceased male member.—*Butler v. Wilson*, 54 Okla. 229, 153 Pac. 823, 826.

(16) **State law governs since statehood.**—The law of descent and distribution of the state of Oklahoma has governed in the devolution of estates of the Indian tribes since statehood.—*Van Buskirk v. Grisso* (Okla.), 157 Pac. 307. The laws of descent and distribution of the Creek Nation having been made to apply, as to the distributive share of certain allotted lands and funds of said tribe by section 28 of the act of congress of March 1, 1901, the courts of the state of Oklahoma take judicial knowledge of such laws and customs of the Creek nation.—*Scott v. Jacobs*, 31 Okla. 109, 126 Pac. 780. Where an Indian minor dies after statehood the devolution of the estate is governed by the laws of Oklahoma.—*Aldridge v. Whitten*, 56 Okla. 694, 156 Pac. 667. Sections 13 and 21 of the enabling act and section 2 of article 25 of the constitution repealed that part of section 6 of the Supplemental Creek Agreement providing that the Arkansas laws of descent and distribution should govern the devolution of lands and money provided by the act of congress of March 1, 1901, and substituted therefor the laws of the territory of Oklahoma, but left in force the two provisos of that section to the effect that only Creek citizens and their descendants should inherit lands of the Creek Nation and that if there be no person of this description to inherit, the inheritance should go to non-citizens according to the laws of Oklahoma.—*Moffet v. Jones* (Okla.), 169 Pac. 652. The proviso in section 6 of the Supplemental Creek Treaty that only citizens of the Creek Nation and their Creek descendants shall inherit the lands of the Creek Nation, was not repealed by the enabling act or the constitution, and now remains in full force and effect, and operates upon the laws of descent and distribution of the state of Oklahoma to the extent of limiting the inheritance of Creek lands to Creek citizens and their descendants.—*McDonald v. Ralston* (Okla.), 166 Pac. 405, 407. The estate of an allottee of the Creek Nation who died on February 4, 1912, descends according to the laws of Oklahoma, subject to the provisions of the Creek Supplemental Agreement to the effect that only citizens of the Creek Nation and their Creek descendants shall inherit the lands of

the Creek Nation, and that if there is no person of Creek descent to inherit, the estate shall go to non-citizen heirs in the order named in the laws of Oklahoma.—*Hughes v. Bell*, 55 Okla. 555, 155 Pac. 604, 605.

(17) *Indian marriages.*—One of the effects of the act of congress of June 28, 1898, is that the issue of Indian marriages is legitimate.—*Finley v. Thompson* (Okla.), 174 Pac. 535. Marriages between citizens of the Creek Nation residing therein, contracted according to the usages and customs of the tribe of which they were members during the time that the tribal relations existed, where recognized by the general government will be deemed valid in the courts of Oklahoma, and the issue of such marriages regarded as legitimate and entitled to all inheritances of property or other rights the same as in the case of the issue of other forms of lawful marriage.—*Chancey v. Whinnery*, 47 Okla. 272, 147 Pac. 1036.

(18) *Inheritance by or through illegitimate Indian children.*—Lands of the illegitimate child of a woman of Creek blood can not descend through her father who is of Seminole blood.—*Bruner v. Oswald* (Okla.), 178 Pac. 693. When the laws of descent and distribution of the state of Arkansas were extended over the Creek Nation in 1902, prior to the death of an illegitimate child its allotment would descend as therein provided.—*Oklahoma Land Co. v. Thomas* (Okla.), 179 Pac. 937, 939. The statutes of the Creek Nation confers upon an illegitimate child who has been recognized by his father as his own the right to share in the estate of the putative father, but does not give to his brothers and sisters of the half blood the right to share in its estate with the sister of the whole blood when the father died prior to the death of such child.—*Oklahoma Land Co. v. Thomas* (Okla.), 179 Pac. 937, 938.

(19) *What law governs.*—If a Creek citizen dies before receiving his allotment, he is not seised at the time of his death of an inheritable estate in lands afterwards allotted to him or to his heirs, and the descent of such allotment is cast at the time the certificate of allotment is issued, and the law in effect at that particular time governs in the devolution of said allotted lands.—*McDonald v. Ralston* (Okla.), 166 Pac. 405, 407. The law in force at the date of the allotment controls as to when the title to the allotment of a deceased Creek citizen vests in his heirs.—*Jesse v. Chapman* (Okla.), 173 Pac. 1044, 1045.

13 *Taking by contract, agreement, or family settlement.*—A marriage contract whereby neither party is, on the death of the other, to partake of the decedent's estate, will be enforced in all its terms on the death of either, unless it is shown that fraud was involved in the making of it.—*Watson v. Watson*, 104 Kan. 578, 180 Pac. 242, 182 Pac. 643. The statutory provision that the property of an intestate, who leaves neither issue nor parent, shall be disposed of as though his parent had survived him and died owning it, relates to the descent of

the property, and has no relation to rights that may be asserted under a contract.—*Malaney v. Cameron*, 99 Kan. 70, 161 Pac. 1180. Where a member of a mutual benefit society has made his certificate payable to his heirs, they do not take the fund by descent, but by contract. The rights of the beneficiaries in a certificate taken out by such a member are such as the contract confers, and are not rights arising by operation of statutory rules respecting descent and distribution. The contract, and not the statute, fixes their rights, and they have such rights only as the contract of insurance vests in them. Reference therefore must be had to the terms of the agreement, and not to the provision of the statute, to ascertain the rights of the parties.—*Burke v. Modern Woodmen*, 2 Cal. App. 611, 84 Pac. 275, 276. If such a person died, leaving ten heirs, each would be entitled to one-tenth of the proceeds of the certificate.—*Burke v. Modern Woodmen*, 2 Cal. App. 611, 84 Pac. 275, 276. If a timber-culture claimant die before obtaining title, and the grant is to his heirs, such heirs do not take by inheritance, but take equally, regardless of the proportions in which they would take under the law of succession of the state. The heirs, in such cases, must be found by the law of the state or territory in which the land is situated, because the United States has no general law of succession.—*Cooper v. Wilder*, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591, 592. By the law of California, the widow is an heir of the husband.—*Cooper v. Wilder*, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591, 592. The law looks with favor upon compromise agreements for the settlement of estates voluntarily and fairly made by members of a family, although the property has been disposed of upon a plan different from that prescribed in the statutes of descents and distributions, and different from that which might have been adjudged by a court of equity.—*Riffe v. Walton* (Kan.), 182 Pac. 640, 642. Where the rights of creditors do not interfere, a distribution of a family estate may be accomplished, through agreement, even if no formal conveyances are made, through the application of the doctrine of estoppel.—*Riffe v. Walton* (Kan.), 182 Pac. 640, 642. Where a family settlement of an estate was fairly made and covered all the property of the estate it can not be set aside merely upon the ground that the part assigned to the widow was less than she would have received under a statutory distribution, where it appears that her allotment was sufficient to enable her to live comfortably, in a manner in keeping with her station in life, and it further appears that she was satisfied with her allotment, and had the use of the same for seventeen years.—*Riffe v. Walton* (Kan.), 182 Pac. 640, 642. Where one tract of land, in which the widow of deceased was entitled to a one-half interest, was not included in the allotment and disposition, made by family agreement, of an estate, and the court found upon conflicting evidence that the widow never intended by the agreement made to relinquish her claim to such land, it can not be held that she was estopped to claim title



to the same and to make such disposition thereof, by will or otherwise, as she pleased.—*Riffe v. Walton* (Kan.), 182 Pac. 640, 642.

14. Repudiation of will and taking under the statute.—If a man executes a joint will with his wife, who has no property outside of the community, and after her death brings a suit to remove a cloud from his title to his property, alleging that the will is the cloud and makes all the legatees and devisees parties to the suit, he is held, after a decree granting the relief prayed, to have repudiated the will and taken the property under the statute.—*Estate of Anderson*, 18 Ariz. 266, 269, 158 Pac. 457.

15. Inheritance by or through illegitimate children.

(1) Right of. Acknowledgment.—The right of an illegitimate child to inherit from its father is given by statute, and such child may inherit when the father has acknowledged it as his child by an instrument in writing properly witnessed; but he only inherits from his father, directly, and as an illegitimate child. He does not inherit the estates of his lineal or collateral kindred.—*Eddie v. Eddie*, 8 N. D. 376, 73 Am. St. Rep. 765, 79 N. W. 856. A child which is the offspring of an unauthorized matrimonial union between a white man and an Indian woman can not inherit from its father.—*In re Walker's Estate*, 5 Ariz. 70, 46 Pac. 67, 69. The term "illegitimate child" as used in the California statute respecting illegitimate children and the right of succession to their property, includes illegitimate children who have been legitimated.—*Wolf v. Gall*, 32 Cal. App. 296, 163 Pac. 350; differing on this point, from same case, 32 Cal. App. 286, 163 Pac. 346. At common law, an illegitimate child could not be the heir of any one, and could not have heirs, except of his own body; but this harsh rule has been changed, in Oregon, by §§ 7351, 7352.—*State v. McDonald*, 59 Or. 520, 526, 117 Pac. 281. Where a husband, in obtaining a divorce, testifies, in the presence of a witness, that he is the father of certain children by his first marriage, and thereby admits the paternity of such children, they, even if illegitimate, become, by such admission, his lawful heirs under the statute.—*State v. Clifford*, 81 Wash. 324, Ann. Cas. 1916D, 329, 142 Pac. 472. An illegitimate child who has not been adopted by his or her father is not, on the latter's dying intestate, an heir of his, and hence is not interested in the condition of his estate or the amount of property, if any, subject to administration.—*In re Palomares's Estate*, 179 Cal. 306, 180 Pac. 936. Where a man dies more than four months after obtaining an interlocutory divorce decree on the ground of desertion, and five months after the death, the wife gives birth to a child, the child will not be held legitimate, if satisfactory evidence is produced showing that the circumstances of the case and the physical condition of the husband made it impossible that the latter could have been the father.—*Estate of Walker*, 176 Cal. 402, 168 Pac. 689. A child born out of lawful wedlock becomes legitimate for all purposes in case his parents intermarry subsequently, or his father

duly acknowledges him as provided by statute; thereafter, he can inherit from a grandmother as well as from a brother or sister.—*Wolf v. Gall*, 32 Cal. App. 296, 163 Pac. 350; approving same result reached in same case, 32 Cal. App. 286, 163 Pac. 346. A child born of a marriage contracted and consummated in accordance with law, although void on account of the disability of one of the parties, such as having a living spouse undivorced, is legitimate, and, so being, may inherit from the parents as though born in lawful wedlock.—*Copeland v. Copeland* (Okla.), 175 Pac. 764. In the enactment of the Kansas statute, the legislature intended to give an illegitimate child, where recognized as therein required, the status of a general heir in the matter of the descent and distribution of the property of the intestate, and that such a child is entitled to inherit from his father's father.—*Smith v. Smith* (Kan.), 182 Pac. 538, 541. Where an illegitimate child was acknowledged by its father and afterwards died without issue, after the death of its mother, intestate, while possessed of a Seminole allotment, the father, a Seminole freedman, inherited the estate of such child.—*Van Buskirk v. Grisso* (Okla.), 157 Pac. 307.

## REFERENCES.

Right of illegitimate children to inherit in certain events.—See note *Kerr's Cal. Cyc. Code*, § 1387. Inheritance by children of illegitimates.—See *Kerr's Cal. Cyc. Civ. Code*, § 1388, note 2. Power of illegitimates to inherit and to transmit inheritances.—See note 12 *Am. St. Rep.* 101. Inheritance by, through, or from illegitimate.—See note 23 *L. R. A.* 753-758. Illegitimates as next of kin.—See note 15 *L. R. A.* 301. Inheritance from or through mother.—See *Kerr's Cal. Cyc. Civ. Code*, § 1387, notes 19-25. Legitimation of illegitimate child.—See note 1 *L. R. A.* (N. S.) 773. Rights of lineal descendants of illegitimate to inherit through him.—See note 27 *L. R. A.* (N. S.) 220.

(2) Succession to estate of illegitimate not acknowledged or adopted.—Section 1388 of the California Civil Code provides the rule of succession as to the whole estate of an illegitimate, not acknowledged nor adopted by its father, who dies intestate, without lawful issue, except in so far as it may be qualified by § 1387 of said code, and this rule, being contrary to the general rule of succession prescribed by § 1386 of the same code, must prevail over everything contained in that section; because it is provided in said § 1386 that the estate must be succeeded to and must be distributed in the manner therein stated, "unless otherwise expressly provided" in such code. But this rule of succession has reference solely to the separate property of the deceased husband or wife. Sections 1401 and 1402 of said code purport to provide the rules as to community property.—*Estate of De Cigaran*, 150 Cal. 682, 89 Pac. 833, 836. If an illegitimate daughter, who has never been acknowledged by her father, dies possessed of separate estate, it passes on her death, intestate, and without issue, not to her surviving husband, but to another illegitimate child of her predeceased mother, by another

father, who had likewise never been adopted or acknowledged by her father. "We may not be able to see any good reason for the exclusion of the surviving spouse of the illegitimate, where she dies without lawful issue, and the giving of the estate to the mother or her heirs in preference to such spouse; but that fact is immaterial where the legislature has said in unmistakable terms that it shall so be."—*Estate of De Cigaran*, 150 Cal. 682, 89 Pac. 833, 836.

(3) **Sufficiency of acknowledgment. Evidence of recognition.**—The required statutory acknowledgment of an illegitimate child by his father need not be made for the express purpose of admitting the child to heirship; a collateral acknowledgment in writing of this kind is a sufficient compliance with the statute. It might be that the father would desire to recognize his child for many other reasons; and if such recognition were made for any reason, it ought to be sufficient to enable the child to become an heir to his estate, and to place it, so far as the estate is concerned, on an equality in law with the legitimate children.—*In re Rohrer*, 22 Wash. 151, 50 L. R. A. 350, 60 Pac. 122. A question having arisen as to who was the father of the child, through whom the mother claimed, proof tending to show general and notorious recognition of the child as his own by him was competent to establish the rule of inheritance.—*Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522. A statute which provides that a father may legitimate an illegitimate child by receiving it into his family, with consent of his wife, and publicly acknowledging it to be his own, applies only to illegitimate minor children of a father. Paternity can not be established by general reputation, but if proof aliunde has been given of membership of the family of a deceased, declarations, made after the child has reached the age of majority, as to the facts of paternity and illegitimacy of the child, are admissible on the question of paternity, but not to prove the public acknowledgment required to be made when the child was a minor, because acts done by the father, which go to constitute a legitimation, must be done while the child is a minor.—*Estate of Heaton*, 135 Cal. 385, 67 Pac. 321; and the consent which such statute contemplates must be a consent given after knowledge is brought home to the wife that the child is the illegitimate offspring of her husband.—*Estate of Heaton*, 135 Cal. 385, 67 Pac. 321. The criterion referred to in the statute is the treatment usually accorded to legitimate children, and it is not material that the alleged father ever had a child of his own, that there might be a criterion by which to determine how he would treat his legitimate child.—*Estate of Heaton*, 139 Cal. 237, 73 Pac. 186. The illegitimate child of a decedent may inherit if he can produce a written acknowledgment of parentage signed by such decedent in the presence of a competent witness; the writing need not recite the fact of illegitimacy and the witness need not sign it, and it is to be liberally construed.—*Estate of Loyd*, 170 Cal. 85, 148 Pac. 522. Where the father of an illegitimate child dies intestate, the only mode by which such illegitimate child can be made an heir of the estate of

such father, under the laws of Arkansas, which were extended over the Indian Territory, is for the father to have made a declaration in writing and the same must have been recorded, as provided by the statutes of Arkansas.—*Rentle v. Rentle* (Okla.), 172 Pac. 1082, 1084. Under the laws of the state of Kansas illegitimate children inherit from the mother, and the mother from the children. But the children also inherit from the father whenever they have been recognized by him as his children; but such recognition must have been general and notorious or else in writing. Held in this case that the evidence of such recognition was sufficient to establish the parentage in question.—*McLean v. McLean*, 92 Kan. 326, 140, 140 Pac. 847, 849. The effect of the recognition by the father of an illegitimate child under the laws of the Creek nation did not have the general effect of legitimizing such offspring, but only had the effect of determining the line of descent which should prevail as to the property of such father or child at the time of their respective deaths, and the act of recognition had no effect as to the relations between the child and its mother, as to whom it was still illegitimate.—*Oklahoma Land Co. v. Thomas* (Okla.), 179 Pac. 937, 938. The extent of the recognition necessary to meet the requirements of the statute relative to illegitimate children, depends in some measure upon the circumstances of the case, and where frequent opportunities for such recognition are presented for a long period of time, more is required than when such opportunities are less in number.—*Smith v. Smith* (Kan.), 182 Pac. 538, 539.

## REFERENCES.

Sufficiency of acts of acknowledgment of illegitimate child.—See *Kerr's Cal. Civ. Code*, § 1387, note 27. Evidence of declarations to show maternity of illegitimate child.—See note 11 *L. R. A. (N. S.)* 1052.

(4) *Presumption as to legitimacy.*—It is well settled, on grounds of public policy affecting children born during marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in lawful wedlock can not be rebutted by the testimony of the husband or wife to the effect that sexual intercourse has or has not taken place between them; nor are the declarations of the husband or wife competent as bearing on the question. Illegitimacy may be proved, but it can not be proved by the evidence of a husband or wife, that, while living together, they did not have sexual intercourse.—*Estate of Mills*, 137 Cal. 298, 92 Am. St. Rep. 175, 70 Pac. 91. A child born in wedlock is presumed to be legitimate, and this presumption can not be overthrown by the general and notorious recognition of it by a putative father, or by his assertions, however solemnly expressed, that the child was begotten by him.—*Bethany Hospital Co. v. Hale*, 64 Kan. 367, 67 Pac. 848. If testimony is introduced which tends to show that a woman, who claims to be the illegitimate daughter and sole heir of an unmarried man, was born in wedlock, the presumption of

legitimacy can only be overcome by the clearest and most conclusive evidence of non-access by the husband.—*Bethany Hospital Co. v. Hale*, 64 Kan. 367, 67 Pac. 848. For evidence showing that plaintiff was born in lawful wedlock, though after her father's death, see *Kaylton v. Kaylton*, 45 Or. 116, 74 Pac. 491, 494. The presumption of legitimacy does not operate to change the general rule that in civil cases the issue of legitimacy is to be determined upon the preponderance of evidence.—*In re Walker's Estate*; *Walker v. Nason* (Cal.), 181 Pac. 792, 797. Where the question of legitimacy is involved, evidence of the wife's relations with other men is wholly immaterial on the issue of non-intercourse by the husband; such relations may have existed, and yet, if intercourse were had with the husband during the period of possible conception, the presumption is conclusive that the children conceived during lawful wedlock are his.—*In re Walker's Estate*; *Walker v. Nason* (Cal.), 181 Pac. 792, 798.

(5) *Illegitimacy, how inferred.*—The illegitimacy of a child may be inferred from the fact that its alleged father was never married until seven or eight years after the child's birth; that he was acquainted with and had relations with the mother; and from the declarations made by him to numerous witnesses that the child was his.—*Estate of Heaton*, 139 Cal. 237, 73 Pac. 186, 187.

(6) *Construction of Utah statute.*—The evident intention of the Utah statute is, that illegitimate children shall have vested in them inheritable blood and the right to inherit from the father, when acknowledged by him, in the same manner and to the same extent as if they had been born legitimate, and the right, when once vested in the illegitimate, extends to his descendants, and they likewise become heirs in the event of the death of their father. Hence where a man had an illegitimate child by an Indian girl, accepted such child as his own, took him into his home, cared for and raised him as his own child, manifesting that affection for the child in many ways that point unerringly to a father, such child thereby acquires inheritable blood, which he may transmit to his child, and on his death before his father, the children of such illegitimate child inherit his estate.—*In re Garr's Estate*, 31 Utah 57, 86 Pac. 757, 759. The territorial act of Utah of March 3, 1852, providing that "illegitimate children and their mothers inherit in like manner from the father whether acknowledged by him or not, provided that it may be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children," was disapproved by the anti-polygamy act of July 1, 1862.—*Pratt v. Pratt*, 7 Utah 278, 26 Pac. 576; *Handley's Estate*, 7 Utah 49, 24 Pac. 673.

(7) *Right of non-resident alien.*—When a non-resident alien, before the enactment of a statute making every illegitimate child an heir of the person who, in writing, signed in the presence of a competent

witness, acknowledges himself to be the father of such child, acknowledged, in writing, in the presence of competent witnesses, that he was the father of a certain illegitimate child, but died after such statute took effect, such child is entitled to his real property, in a state where such acknowledgment was made and such statute exists, because such acknowledgment and statute establish the fact that he was the father of the child, and such fact, being thus established, makes the child an heir of his deceased father.—*Moen v. Moen*, 16 S. D. 210, 92 N. W. 13.

(8) *Pretermitted illegitimate child.*—If an illegitimate child is unintentionally omitted from its mother's will, it is entitled to share in her estate, in the same manner as if legitimate, though it had never been legitimated by the subsequent intermarriage of her parents, or by the acknowledgment or adoption of her father.—*Estate of Wardell*, 57 Cal. 484, 492. An illegitimate child is not forgotten in a will if it is referred to as "Otto" instead of its real name, and a legacy is given to it as the child of the woman named, if she has no other child, and it is evident that the child named was in the mind of the testator. It is not necessary, after the acknowledgment by a father of his illegitimate child, that there should be an intermarriage between the father and the mother of the child either before or after such acknowledgment; and the fact of the father's death does not absolve his estate completely from such allowance as the statute provides for minor children. It follows, therefore, that such a child is entitled to an allowance from his father's estate as his "child."—*In re Kornetzky*, 20 Wash. 563, sub. nom. *In re Gorkow's Estate*, 56 Pac. 385, 387, 388. If a man, having illegitimate children whom he has duly acknowledged, dies leaving a will which makes no specific mention of them, but bequeaths five dollars to "any other person or persons" who should "present themselves claiming to be" his "heirs," such children are not entitled to succeed as in a case of intestacy, under section 1307 of the Civil Code.—*Estate of Lindsay*, 176 Cal. 238, 168 Pac. 113. Sale does not divest pretermitted child of his interest. See note post, on probate sales, following table after § 592.

#### 16. Construction of statutes.

(1) *In general.*—Although the act of congress endows the widow, in Utah, with a one-third part of all land whereof the husband was seised, and she has therefore a dower interest, a life estate, to the extent of one-third of all the real estate whereof the husband died seised, she is also entitled, under the law of succession, to one-third of all the real estate remaining after the dower is set off to her, and also to the undivided one-third of all the personal property after the debts, costs, and expenses attending the settlement of the estate are paid; and minor heirs are each entitled, by succession, to the undivided one-third of the remaining two-thirds of the real estate and personal property, subject to the widow's right of dower, as above stated.—

*Knudsen v. Hannberg*, 8 Utah 203, 30 Pac. 749, 752. A proviso in a statute, limiting the general right of a wife to inherit the real estate of her husband, and which is, that she shall not be entitled to any interest in any land of which the husband has made a conveyance, when the wife, at the time of the conveyance, "is not or never has been a resident of this state," does not prevent her from taking the benefit of the acts relative to descents and distributions, if she has ever been a resident of the state. The word "or," in the last clause, should be read "and," as this will not limit the right of inheritance, and will give some meaning to all of the words of the statute.—*Kennedy v. Haskell*, 67 Kan. 612, 73 Pac. 913, 914. The statute of succession in the state of California in providing for the disposition of the separate property of one dying intestate makes no distinction based upon the channel through which the property may have come to the decedent. "Succession to estates is purely a matter of statutory regulations which can not be changed by the court."—*In re Jobson's Estate*, 164 Cal. 312, 43 L. R. A. (N. S.) 1062, 128 Pac. 938. By statute, the widow takes the entire property of a married man who dies intestate leaving neither issue, father, mother, brother, nor sister.—*Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315. A tract of land patented to two married men in the state of Washington, after the enactment of the community property law of that state, is the common property of the parties and their wives and is not held under a joint tenancy with the right of survivorship, and upon the death of one of the patentees his interest descends to his widow and children under the laws of descent, and not to the surviving owner.—*Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858. In order to recover under a petition claiming a widow's statutory interest in real estate the widow must claim under the statute and through her husband.—*Osborn v. Osborn*, 102 Kan. 890, 895, 172 Pac. 23. Section 3831, General Statutes of 1915, providing that under certain circumstances a widow shall be entitled to one-half in value of real estate in which her husband in his lifetime had a legal or equitable interest, refers to legal or equitable interest capable of inheritance, and does not apply to interests in land which were extinguished by the husband's death.—*Osborn v. Osborn*, 102 Kan. 890, 892, 172 Pac. 23. The California statute directing the descent of property from a widow or widower who dies leaving no issue has reference only to persons so described who die intestate.—*In re Hill's Estate* (Cal.), 178 Pac. 710. And this statute is neither local nor special legislation within the constitutional provision whereby local and special legislation is made invalid.—*In re Hill's Estate* (Cal.), 178 Pac. 710.

(2) *Divorce decrees.*—Where an interlocutory decree of divorce has been awarded a wife, but she dies before such decree is made final, the right of the husband to inherit is not affected.—*In re Seller's Estate*, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334. Although it is provided by section 132, Civil Code, that the death of either party to a divorce action, after the entry of the interlocutory judgment, does

not impair the power of the court to enter final judgment, the purpose of this provision is not entirely clear. The entry of such final judgment will not be allowed to operate retroactively so as to take away rights of inheritance which had, by the death, become vested in the surviving spouse.—*In re Seller's Estate*, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 334.

17. What law governs.—For the purposes of determining who are the heirs of a deceased person, resort is to be had to the laws of the state under which the descent is cast; and the "heirs" of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will.—*Burke v. Modern Woodmen*, 2 Cal. App. 611, 84 Pac. 275, 276. The descent of real property is governed by the law of inheritance in the state in which the land is situated. Title to the same can not be affected by the decree of a court of another state.—*Cooper v. Ives*, 62 Kan. 395, 63 Pac. 434. If both the real and personal property of an intestate is situated within this state, which is also his domicile at the time of his death, the laws of the state govern the descent and distribution thereof, following the rule that the descent of personal property is governed by the law of the domicile of the owner, and real property by the law of the place where situated.—*Eddie v. Eddie*, 8 N. D. 376, 73 Am. St. Rep. 765, 79 N. W. 856. As a rule the disposition is governed by the *lex domicilii* decedentes and the descent of real property by the *lex rei sitae*.—*State v. McDonald*, 59 Or. 520, 117 Pac. 281; *Hohn v. Bidwell*, 27 S. D. 249, 130 N. W. 837. The law of the state in which lands are controls the disposition of these lands, as against the law of some other state in which a deceased owner resided, except as a modification may be permitted expressly by that law.—*Estate of Loyd*, 175 Cal. 699, 167 Pac. 157. The law of the state in which the land lies, as such law was at the time the owner died, determines how the land shall descend.—*Estate of Hills*, 176 Cal. 232, 168 Pac. 20. If land in another state is sold in administration proceedings, had in that state, the proceeds do not become personalty, so that the part going to an heir of the owner of the land, descends as such, and not as real property, in case such heir dies before the sale.—*Estate of Hills*, 176 Cal. 232, 168 Pac. 20. So far as creditors are concerned, such state will deal with the property of a decedent within its jurisdiction according to its own laws.—*Vansickle v. Hazeltine*, 29 Ida. 228, 158 Pac. 326. Shares of stock in a corporation are personalty and descend according to the laws of the state where the owner was domiciled when he died; the certificates, which constitute evidence of ownership, are transferred according to the laws of the state where the corporation was organized.—*State (ex rel. Peterson) v. Dunlap*, 28 Ida. 784, Ann. Cas. 1918A, 546, 156 Pac. 1141. Where an intestate at the time of his death was a resident of the state of Oklahoma, and owned property situated at the time of his death in that state, the laws of Oklahoma will govern as to the descent and distribution of said property, and



not the laws of another state where the property may have been acquired.—In re Barnes' Estate, Barnes v. Barnes, 47 Okla. 117, 147 Pac. 504, 505.

**REFERENCES.**

For further authorities concerning succession. See note Kerr's Cal. Cyc. Civ. Code, §§ 1383-1409.

## CHAPTER III.

### PROCEEDINGS RELATIVE TO ESCHEATED ESTATES.

- § 39. Property escheats, when.
- § 40. Time of escheat and recovery of property. Escheat property.
- § 41. Escheated property is subject to what charges.
- § 42. Disposition of escheated property.
- § 43. Attorney-general to bring action.
- § 44. Petition, proceedings for administration, and distribution.
- § 44.1 Action on behalf of state. Intervention. Order to deposit money.
- § 45. Form. Information of attorney-general.
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- § 49. Form. Judgment.
- § 50. Claim to escheated property. Proceedings after judgment by persons making such claim.
- § 50.1 Petition showing claim to estate deposited with state treasurer.
- § 50.2 Unclaimed bank deposits. Escheat of same to state.
- § 50.3 Sale of escheated property by board of control.
- § 50.4 Deposit of unclaimed property. Escheat, and proceeding to vest title in state.
- § 51. Form. Petition by heir to recover money escheated to the state.

### ESCHEAT.

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|---------------------------------------|---|
| 1. General doctrine.                  | 7. Non-resident aliens.                                       |
| 2. Jurisdiction of courts.            | 8. Of deposits in national banks.                             |
| 3. Property of outlawed corporations. | 9. Pleading and practice.                                     |
| 4. Land of Mormon Church.             | 10. Judgments.  |
| 5. Aliens.                            | 11. Limitation of actions.                                    |
| 6. Premature action.                  | 12. Recovery of escheated property, and proceedings therefor. |

### § 39. Property escheats, when.

All property, real and personal, within the limits of this state, which does not belong to any person, belongs to the people. Whenever the title to any property fails for want of heirs or next of kin, it reverts to the people.  
—*Kerr's Cyc. Pol. Code*, § 41.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Laws of 1913, chapter 73, page 278; amending section 608, Compiled Laws of 1913.

Arizona—Revised Statutes of 1913, paragraph 1509.

Hawaii\*—Revised Laws of 1915, section 3256.

Montana—Revised Codes of 1907, section 4837.

New Mexico—Statutes of 1915, section 2119.

North Dakota—Compiled Laws of 1913, section 5760.

Oklahoma—Revised Laws of 1910, section 8436.

Oregon—Lord's Oregon Laws, section 7363; as amended by Laws of 1913, chapter 344, page 638; Laws of 1911, chapter 69, page 108 (escheat of money belonging to inmates of insane asylums).

South Dakota—Compiled Laws of 1913, section 3418.

Utah—Compiled Laws of 1907, section 3976.

Washington—Remington's 1915 Code, section 1356.

**§ 40. Time of escheat and recovery of property. Escheat property.**

Whenever any person dies leaving any property in this state not disposed of by will, and there are no persons entitled to succeed thereto under the laws of this state, the same shall escheat to the state as of the date of the death of the decedent. The property or proceeds of any estate deposited in the state treasury after final decree of distribution or judgment of the superior court by reason of the failure of heirs to make claim thereto may be recovered upon judgment of the superior court or order of the state board of control as provided in the Code of Civil Procedure.—*Kerr's Cyc. Civ. Code*, § 1405.

**§ 41. Escheated property is subject to what charges.**

Real property passing to the state under the last section, whether held by the state or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to all the provisions of title eight, part three, of

the Code of Civil Procedure.—*Kerr's Cyc. Civ. Code*, § 1407.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Montana\*—Revised Codes of 1907, section 4838.

North Dakota—Compiled Laws of 1913, section 5761.

South Dakota—Compiled Laws of 1913, section 3419.

Utah—Compiled Laws of 1907, section 3976.

Washington—Remington's 1915 Code, section 1362.

**§ 42. Disposition of escheated property.**

When such judgment or order is obtained, a certified copy thereof must be filed with the state treasurer as his voucher. Thereupon the property must be delivered, or the proceeds paid, to the claimant, on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent devolves and escheats to the people of the state, and must be placed by the state treasurer to the credit of the school fund.—*Kerr's Cyc. Civ. Code*, § 1406.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 594.

Arizona—Revised Statutes of 1913, paragraph 1524.

Idaho—Compiled Statutes of 1919, section 7806, 7807.

Montana—Revised Codes of 1907, section 4837.

New Mexico—Statutes of 1915, section 2122.

Oregon—Lord's Oregon Laws, section 7363.

South Dakota—Compiled Laws of 1913, section 3413.

Utah—Compiled Laws of 1907, section 3976.

Washington—Remington's 1915 Code, section 1356.

**§ 43. Attorney-general to bring action.**

It shall be the duty of the attorney-general to institute investigation for the discovery of all real and personal property which may have or should escheat to the state, and for that purpose shall have full power and authority to cite any and all persons before any of the superior

courts of this state to answer investigations and render accounts concerning said property, real or personal, and to examine all books and papers of any and all corporations. When any real or personal property shall be discovered, which should escheat to the state, the attorney-general must institute suit in the superior court of the county where said property shall be situated, for the recovery, to escheat the same to the state. The proceedings in all such actions shall be those provided for in title eight, part three, Code of Civil Procedure. The attorney-general may, for the purposes and objects of this section, employ counsel to act in his place and stead for the discovery and recovery of both personal and real property, and in such proceedings, both in investigation for discovery or proceedings for recovery, such counsel so employed shall have the power and authority of the attorney-general. The compensation for services of such counsel shall be determined by the board of examiners, and paid out of the sums so found to be escheated and recovered to the state, and not otherwise; provided, that the state of California shall in no case be responsible for any charges for attorney fees for suits prosecuted under this act, but the attorney-general is hereby authorized to pay to the person or persons discovering the same the costs and charges of prosecuting any suit or suits under this act, a sum not in any case exceeding ten per cent of the sums actually received as provided in this act.—*Kerr's Cyc. Pol. Code*, § 474.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

**Alaska**—Laws of 1913, chapter 73, page 278; amending section 610, Compiled Laws of 1913; Laws of 1915, chapter 40, page 84.

**Arizona**—Revised Statutes of 1913, paragraph 1510.

**North Dakota**—Compiled Laws of 1913, section 5760.

**Oregon**—Lord's Oregon Laws, sections 7364 and 7366; as amended by Laws of 1915, chapter 191, page 248 (action by district attorney).

**South Dakota**—Compiled Laws of 1913, volume II, page 195, section 1.

**Washington**—Remington's 1915 Code, section 1363.

**§ 44. Petition, proceedings for administration, and distribution.**

At any time after two years after the death of any decedent, leaving property to which the state is entitled by reason of its having escheated to the state, the attorney-general shall commence a proceeding on behalf of the state in the superior court for Sacramento county, to have it adjudged that the state is so entitled. Such action shall be commenced by filing a petition, which shall be treated as the information elsewhere referred to in this title. There shall be set forth in such petition a description of the property, the name of the person last possessed thereof, the name of the person, if any, claiming such property, or any portion thereof, and the facts and circumstances by virtue of which it is claimed the property has escheated. Upon the filing of such petition, the court must make an order requiring all persons interested in the estate to appear and show cause, if any they have, within sixty days from the date of the order, why such estate should not vest in the state. Such order must be published at least once a week for four successive weeks in a newspaper published in said county of Sacramento, the last publication to be at least ten days prior to the date set for the hearing. Upon the completion of the publication of such order the court shall have full and complete jurisdiction over the state, the property, and the person of everyone having or claiming any interest in the said property, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon.

**ADMINISTRATION AND DISTRIBUTION.**—If proceedings for the administration of such estate have been instituted, a copy of such order must be filed with the papers in such estate in the office of the county clerk where such proceedings were had. If proceedings for the adminis-

tration of any estate of any such decedent have been instituted and none of the persons entitled to succeed thereto have appeared and made claim to such property, or any portion thereof, before the decree of final distribution therein is made, or before the commencement of such proceeding by the attorney-general, or if the court shall find that such persons as have appeared are not entitled to the property of such estate, or of any portion thereof, the court shall, upon final settlement of the proceedings for the administration of such estate, after the payment of all debts and expenses of administration, distribute all moneys and other property remaining to the state of California. The property so distributed shall be held by the state treasurer for a period of five years from the date of the decree making such distribution within which time the same may be claimed in the manner in this title hereafter provided, but a non-resident foreigner claiming succession in any case must appear and claim within five years from the death of the decedent, and any person who does not appear and claim as herein required shall be forever barred, and such property, or so much thereof as is not so claimed, shall vest absolutely in the state. In any proceeding brought by the attorney-general under this title any two or more parties and any two or more causes of action may be joined in the same proceeding and in the same petition without being separately stated, and it shall be sufficient to allege in the petition that the decedent left no heirs to take the estate and the failure of heirs to appear and set up their claims in any such proceeding, or in any proceedings for the administration of such estate, shall be sufficient proof upon which to base the judgment in any such proceeding or such decree of distribution. Where proceedings for the administration of any estate have not been commenced within six months from the death of any decedent the attorney-general may direct the public administrator to com-

mence the same forthwith.—*Kerr's Cyc. Code Civ. Proc.*, § 1269.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

**Alaska**—Laws of 1913, chapter 73, page 278; amending section 612, Compiled Laws of 1913.

**Montana**—Revised Codes of 1907, section 7356.

**Nevada**—Revised Laws of 1912, section 6131.

**North Dakota**—Compiled Laws of 1913, section 5760.

**Oklahoma**—Revised Laws of 1910, section 8438.

**Oregon**—Lord's Oregon Laws, section 7366; as amended by Laws of 1915, chapter 191, page 248 (action by district attorney).

**South Dakota**—Compiled Laws of 1913, section 3418.

**Utah**—Compiled Laws of 1907, section 2440.

**Wyoming**—Compiled Statutes of 1910, section 3138; Laws of 1911, chapter 57, page 76.

**§ 44.<sup>1</sup> Action on behalf of state. Intervention. Order to deposit money.**

Whenever the attorney-general is informed that any estate has escheated or is about to escheat to the state or that the property involved in any action or special proceeding has escheated or is about to escheat to the state, he may commence an action on behalf of the state to determine its rights to said property or may intervene on its behalf in any action or special proceeding affecting any such estate and contest the rights of any claimant or claimants thereto. He may also apply to the superior court, or any judge thereof, for an order directing the county treasurer to deposit in the state treasury all moneys and effects in his possession which may become payable to the state treasury pursuant to section one thousand seven hundred thirty-seven of this code.—*Kerr's Cyc. Code Civ. Proc.*, § 1269a.

**§ 45. Form. Information of attorney-general.**

[Title of court.]

[Title of action.]<sup>1</sup>

{ No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

Now comes —, the attorney-general of the state of —, who, being informed that the certain estate herein—  
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after described has escheated to said state, files this information and complaint in behalf of said state, and alleges:

That on or about the — day of —, 19—, one — died in said state; that, at the time of his death, the said — was seised in fee of the following described real property, namely, —;<sup>3</sup> and that said property is situated in the county<sup>4</sup> of —, wherein this information is filed;<sup>5</sup>

That the said — died intestate, and left no heirs, widow, or known kindred capable of inheriting said real property;

That the said —,<sup>6</sup> late of the county<sup>7</sup> of —, was the last person lawfully possessed of said land, but that the defendants, — and —, are now in the possession of said property, and claim an interest therein adverse to said state and against law;

That more than —<sup>8</sup> years have elapsed since the death of the said —, and that no part of the estate aforesaid has been sold, as is provided by law, for the payment of the debts of said decedent;

That neither the said defendants, nor either nor any of them, has any right to said estate, or to any interest therein; but that, by reason of the facts and circumstances heretofore and herein set forth, the said real property has escheated to the said state of —, and that the lawful right to said estate is now in the said state of —.

Wherefore the plaintiff prays that the aforesaid described estate be adjudged to belong to the state of —; that the said state is entitled to the possession of said estate, and that a decree issue that said state be seised thereof; that plaintiff recover costs of suit against the defendants; that the court make an order that such property<sup>9</sup> be sold by the sheriff of the county wherein it is situate, at public sale, for gold coin, after giving such

notice of the time and place of sale as may be prescribed by the court in said order; and that said sheriff be further directed to make report of his proceedings as required by law.

—, Attorney-General.

**Explanatory notes.**—<sup>1</sup> As, The State of —, Plaintiff, v. John Doe and Richard Roe, Defendants. <sup>2</sup> File number. <sup>3</sup> Describe the property. <sup>4</sup> Or, city and county. <sup>5</sup> The information must be filed in the designated court of the county in which said estate, or any part thereof, is situated. <sup>6</sup> Name of decedent. <sup>7</sup> Or, city and county. <sup>8</sup> Insert "five," or other statutory number of years, where the decedent left surviving heirs who are non-resident foreigners, and who fail to appear and claim such succession within five years after the death of decedent. Otherwise, omit the paragraph. <sup>9</sup> Unless it consists of money. Use the same form of summons as in an ordinary civil action.

**§ 46. Form. Order to show cause.**

[Title of court.]

[Title of cause.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

It appearing from the information of —, the attorney-general of the state of —, filed on the — day of —, 19—, in the — court of the county <sup>2</sup> of —, that — died intestate on or about the — day of —, 19—, in the county <sup>3</sup> of —, state of —, leaving in said county <sup>4</sup> the following described real property, to wit: —; <sup>5</sup> that at the time of his death the said — was seised in fee of said property; that he was the last person lawfully possessed of said land; that he left no heirs surviving him; <sup>6</sup> and that by reason of such facts and circumstances, the property mentioned has escheated to the said state of —, and that said state is rightfully entitled by law thereto;—

It is therefore ordered, That all persons interested in the estate of —, deceased, appear and show cause, if any they have, within forty days from the date of this order, why such estate should not vest in the said state of —.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2-4 Or, city and county. 5 Describe the property. 6 Or state the facts, if there are any non-resident foreign heirs, who have failed to appear and to claim the succession. See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1404.

**§ 47. Receiver of rents and profits.**

The court, upon the information being filed, and upon application of the attorney-general, either before or after answer, upon notice to the party claiming the estate, if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge of such estate, or any part thereof, or to receive the rents, income, and profits of the same until the title of such state is finally settled.—*Kerr's Cyc. Code Civ. Proc.*, § 1270.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

**Alaska**—Laws of 1913, chapter 73, page 278; amending section 611, Compiled Laws of 1913.

**Montana**—Revised Codes of 1907, section 7357.

**Nevada**—Revised Laws of 1912, section 6135.

**Oregon**—Lord's Oregon Laws, section 7368.

**South Dakota**—Compiled Laws of 1913, volume II, page 196, section 5.

**§ 48. Appearance, pleadings, trial, judgment, and sale.**

All persons named in the information may appear and answer, and traverse or deny the facts stated therein at any time before the time for answering expires, and any other person claiming an interest in such estate may appear and be made a defendant, by motion for that purpose in open court within the time allowed for answering, and if no such person appears and answers within the time, then judgment must be rendered that the state is the owner of the property in such information claimed.

**TRIAL OF ISSUES.**—But if any person appears and denies the title set up by the state, or traverses any material fact set forth in the information, the issue of fact must be tried as issues of fact are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the state has good title to the

property in the information mentioned, or any part thereof, judgment must be rendered that the state is the owner and entitled to the possession thereof, and that it recover costs of suit against the defendants who have appeared and answered.

**ORDER OF SALE.**—In any judgment rendered, or that has heretofore been rendered by any court, escheating property to the state, on motion of the attorney-general, the court must make an order that such property, unless it consists of money, be sold by the sheriff of the county where it is situate, at public sale, for gold coin, after giving notice of the time and place of sale, as may be prescribed by the court in such order; that the sheriff, within five days after such sale, make a report thereof to the court, and upon the hearing of such report, the court may examine the report and witnesses in relation thereto, and if the proceedings were unfair, or if the sum bid [was] disproportionate to the value, or if it appears that a sum exceeding said bid, exclusive of the expense of a new sale, may be obtained, the court may vacate the sale, and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place.

**NEW SALE MAY BE ORDERED, WHEN.**—If an offer greater in amount than that named in the report is made to the court in writing, by a responsible person, the court may, in its discretion, accept such offer and confirm the sale to such person, or order a new sale. If it appears to the court that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a sum exceeding such bid, exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned is made and accepted by the court, —

**CONFIRMATION OF SALE.**—The court must make an order confirming the sale, and directing the sheriff, in the

name of the state, to execute to the purchaser or purchasers a conveyance of said property sold; and said conveyance vests in the purchaser or purchasers all the right and title of the state therein, and the sheriff must, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the state, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court, not exceeding ten per cent on the amount of such sale, and the residue thereof must be paid by said sheriff into the state treasury.—*Kerr's Cyc. Code Civ. Proc.*, § 1271.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Laws of 1913, chapter 73, page 278; amending section 612, Compiled Laws of 1913.

Arizona—Revised Statutes of 1913, paragraphs 1513, 1515, 1516, 1519.

Montana—Revised Codes of 1907, section 7358.

Nevada—Revised Laws of 1912, section 6132.

Oklahoma—Revised Laws of 1910, sections 8440, 8441.

Oregon—Lord's Oregon Laws, sections 7369, 7370.

South Dakota—Compiled Laws of 1913, volume II, page 195a, sections 4-11.

#### § 49. Form. Judgment.

[Title of court.]

[Title of cause.]

{ No. —.1 Dept. No. —.  
[Title of form.]

This cause having come on regularly for hearing this — day of —, 19—, and it appearing from the information of the attorney-general, filed herein on behalf of the state of —, that —, on or about the — day of —, 19—, died in the county<sup>2</sup> of —, state of —, leaving real property therein described as follows, to wit: —;<sup>3</sup> that the said —<sup>4</sup> was the last person lawfully possessed of said land; that he died without having disposed of said property by will; that he left no heirs surviving him;<sup>5</sup> and no persons having appeared or answered herein within the time allowed by law, —

It is therefore ordered, adjudged, and decreed, That, by reason of said facts, the state of — is the owner, and is entitled to the possession, of the property described in the information mentioned; that said state be seised thereof; that the sheriff of the said county<sup>6</sup> of —, state of —, that being the county<sup>7</sup> in which said real property is situate, be, and he is hereby, directed to sell said real property, at public sale, for gold coin, after giving notice of the time and place of sale, by —;<sup>8</sup> and that he make report of his proceedings as required by law.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2 Or, city and county. 3 Give description. 4 Decedent. 5 Or as the case may be, if the decedent left non-resident foreign heirs, who have failed to appear and to claim the succession within the time prescribed by the statute. 6, 7 Or, city and county. 8 Posting notice or by publication, as prescribed by the court. The sheriff's report of sale may be the same as his return under a judgment foreclosing a mortgage; and the order confirming his sale may be substantially in the same form as an order confirming a sale of real estate made by an administrator.

**§ 50. Claim to escheated property. Proceedings after judgment by persons making such claim.**

Within five years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof. Said petition shall be verified, and, among other things must state:

The full name, and the place and date of birth of the decedent whose estate, or any part thereof, is claimed.

The full name of such decedent's father and the maiden name of his mother, the places and dates of their respective births, the place and date of their marriage, the full names of all children the issue of such marriage, with the date of birth of each, and the place and date of death of all children of such marriage who have died unmarried and without issue.

Whether or not such decedent was ever married, and if so, where, when, and to whom.

How, when, and where such marriage, if any, was dissolved.

Whether or not said decedent was ever remarried, and, if so, where, when, and to whom.

The full names, and the dates and places of birth of all lineal descendants, if any, of said decedent; the dates and places of death of any thereof who died prior to the filing of such petition; and the places of residence of all who are then surviving, with the degree of relationship of each of such survivors to said decedent.

Whether any of the brothers or sisters of such decedent ever married, and, if so, where, when, and whom.

The full names, and the places and dates of birth of all children the issue of the marriage of any such brother or sister of decedent, and the date and place of death of all deceased nephews and nieces of said decedent.

Whether or not said decedent, if of foreign birth, ever became a naturalized citizen of the United States, and if so, when, where, and by what court citizenship was conferred.

The post-office names of the cities, towns, or other places, each in its appropriate connection, wherein are preserved the records of the births, marriages, and deaths hereinbefore enumerated, and, if known, the title of the public official or other person having custody of such records.

If for any reason, the petitioner is unable to set forth any of the matters or things hereinabove required, he shall clearly state such reason in his petition.

**COPY OF PETITION SERVED ON ATTORNEY-GENERAL.**—A copy of such petition must be served on the attorney-general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it is determined that such person is entitled to the prop-

erty, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant.

**FAILURE TO APPEAR.**—All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants, and persons of unsound mind, the right to appear and file their petitions at any time within the time limited, or within one year after their respective disabilities cease.—*Kerr's Cyc. Code Civ. Proc.*, § 1272.

**Note.**—Concerning an appropriation for the payment of awards or judgments rendered in conformity with this section, see Cal. Stats. 1915, ch. 269, p. 470.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

**Alaska**—Laws of 1913, chapter 73, page 278; amending sections 613 and 614, Compiled Laws of 1913.

**Arizona**—Revised Statutes of 1913, paragraph 1522.

**Kansas**—General Statutes of 1915, section 4663.

**Montana**—Revised Codes of 1907, section 7359; as amended by Laws of 1913, chapter 132, page 483. See Supp. of 1915, page 768.

**Nevada**—Revised Laws of 1912, section 6132.

**Oregon**—Lord's Oregon Laws, section 7374.

**South Dakota**—Compiled Laws of 1913, volume II, page 195b, section 10.

#### § 50.<sup>1</sup> Petition showing claim to estate deposited with state treasurer.

When the estate, or any portion thereof, of any decedent has been deposited with the state treasurer under the provisions of this code, any person entitled to succeed and not a party or privy to any proceeding had under any of the foregoing sections of this title, and who has not appeared in the proceedings for the admin-



istration of such estate, may, within five years after the date of the decree of final distribution, unless otherwise barred, file a petition in the superior court for Sacramento county against the State of California showing his claim or right to the property, or the proceeds thereof, or to any portion thereof. Said petition shall be verified, and, among other things, must state the facts required to be stated in a petition filed under section one thousand two hundred and seventy-two of this code, and upon the filing thereof, the same proceedings shall be had as are therein required.

**WHEN LESS THAN THREE HUNDRED DOLLARS.**—Whenever the amount claimed by any such person is less than three hundred dollars any such claimant may, in lieu of filing such petition, present his claim to the state board of control, showing the same facts required to be stated in such petition and said board may, upon recommendation of the attorney-general, allow and order paid such claim, provided that no such claim shall be so allowed or paid until at least five years after the death of the decedent and then, only, in the event that no other claim is made to such property. When payment has been made under this title to any claimant no suit shall thereafter be maintained by any other claimant against the state, or any officer thereof, for or on account of such property.—*Kerr's Cyc. Code Civ. Proc.*, § 1272a.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 1522.

South Dakota—Compiled Laws of 1913, volume II, page 195b, section 10.

**§ 50.<sup>2</sup> Unclaimed bank deposits. Escheat of same to state.**

All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest and which shall have re-

mained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state.

**ACTION COMMENCED.**—Whenever the attorney-general shall be informed of such deposits, he shall commence an action or actions in the name of the state of California, in the superior court for the county of Sacramento, in which shall be joined as parties the bank or banks in which the moneys are deposited and the names of all such depositors. All or any number of depositors or banks may be included in one action.

**SERVICE OF PROCESS.**—Service of process in such action or actions shall be made by delivery of a copy of the complaint and summons to the president, cashier or managing officer of each defendant bank, and by publication of a copy of such summons in a newspaper of general circulation published in said county for a period of four weeks.

**TRIAL.**—Upon the trial the court must hear all parties who have appeared therein and if it be determined that the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all such moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property.—*Kerr's Cyc. Code Civ. Proc.*, § 1273.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

**Alaska**—Laws of 1913, chapter 73, page 278; amending section 615, Compiled Laws of 1913.

**§ 50.<sup>3</sup> Sale of escheated property by board of control.**

The state board of control is hereby authorized to sell, on behalf of and in the name of the state of California, at any time and in any manner it may deem advisable, personal property heretofore or hereafter distributed to the state of California pursuant to the provisions of section one thousand two hundred sixty-nine of the Code of Civil Procedure, and the proceeds of such a sale shall be delivered to and held by the state treasurer. Any real property so distributed to the state may be sold by the board of control, at public auction, to the highest bidder, for cash, after notice thereof by publication, as hereinafter provided, in a newspaper published in the county in which such real property is situate, or, in an adjoining county if there be no newspaper published in such county. Such notice shall be published once a week for at least three weeks immediately preceding the date of such sale, and shall be sufficient for all the purposes of such sale if said real property be described therein in general terms. The board of control may, in its discretion, reject any and all bids.—*Kerr's Cyc. Code Civ. Proc.*, § 1274.

**§ 50.<sup>4</sup> Deposit of unclaimed property. Escheat, and proceeding to vest title in state.**

All money or other property distributed in the administration of an estate of a decedent and heretofore or hereafter deposited with a county treasurer to the credit of the distributee, must be forthwith delivered into the state treasury by the county treasurer upon the expiration of one year from the date of such deposit.

Money or other property so deposited in the state treasury, if not claimed by the person or persons entitled thereto within five years from the date of such deposit, shall become the property of the state of California by escheat, and the attorney-general shall commence a proceeding on behalf of the state in the superior court for

Sacramento county, in accordance with this title, to have it adjudged that the title to such property has vested in the state.—*Kerr's Cyc. Code Civ. Proc.*, § 1274a.

§ 51. Form. Petition by heir to recover money escheated to the state.

[Title of court.]

[Title of cause.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The undersigned, your petitioner, respectfully represents and alleges:

That he is the brother and heir at law of —, late of —, in the county <sup>2</sup> of —, state of —;

That on or about —, 19—, the aforesaid died intestate in said county <sup>3</sup> and state, leaving certain property in the said county <sup>4</sup> of —, described as follows, to wit: —;<sup>5</sup> and being of the value of — dollars (\$—);

That on or about the — day of —, 19—, an information was filed in the —<sup>6</sup> of the county <sup>7</sup> of —, state of —, by the attorney-general of said state, wherein it was alleged that the said — had died in said last-named county,<sup>8</sup> leaving certain property therein described, which said — had not disposed of by will, and leaving no heir or known kindred or widow capable of inheriting the same, and that by reason thereof the said property had escheated to the said state of —;

That, no legal heirs entitled to the said estate having appeared to answer the said information, judgment was rendered by the aforesaid last-named court on the — day —, 19—, that the said property be escheated to the said state of —, and that said state be seised thereof;

That, at the time of the aforesaid proceeding, the undersigned, your petitioner, was a resident of the state of —;<sup>9</sup> that he had no notice of the pendency of said proceedings, by citation, advertisement, or otherwise,

and that he did not appear therein, either in person or by attorney;

That your petitioner, as heir at law of the aforesaid —, is entitled as of right to the said property hereinbefore described.

Wherefore your petitioner prays judgment that he be declared to be the rightful owner of all of said property, and that said property be relinquished to him. —

—, Attorney for Petitioner.

Explanatory notes.—1 Give file number. 2-4 Or, city and county. 5 Describe the property. 6 Name the court. 7, 8 Or, city and county. 9 Other than the one in which the petition is filed.

#### ESCHEAT.

- |                                       |   |
|---------------------------------------|---|
| 1. General doctrine.                  | 7. Non-resident aliens.                                       |
| 2. Jurisdiction of courts.            | 8. Of deposits in national banks.                             |
| 3. Property of outlawed corporations. | 9. Pleading and practice.                                     |
| 4. Land of Mormon Church.             | 10. Judgments.  |
| 5. Aliens.                            | 11. Limitation of actions.                                    |
| 6. Premature action.                  | 12. Recovery of escheated property, and proceedings therefor. |

1. General doctrine.—In this country, the general rule is, that, when the title to land falls for want of heirs, it escheats to the state. That rule is applicable in Idaho. If a non-resident foreigner does not appear and claim succession within five years after the death of the decedent, the real estate of the deceased escheats to the state without inquest in the nature of "office found" to vest title in the state. The title passes by operation of law, without court proceedings of any kind, where no proceeding, or inquest in the nature of "office found," is provided for by statute in such cases.—State v. Stevenson, 6 Ida. 367, 55 Pac. 886. In California, there seems to be no limit within which native-born American citizens may come forward and claim property to which they have succeeded, at any time before a judgment or decree, in a proceeding to escheat, has been entered; and, when the provisions of the various codes of said state bearing upon the subject-matter are construed together, the inference is, that, in every case of a failure of succession for want of heirs or kindred of a decedent, an action of escheat becomes necessary to vest the title in the state, whether the estate so escheated consists of real or personal property. The state, however, does not come in by way of succession; but, in the event of the absence of all who are entitled to come in by succession, whether the property be real or personal, it goes to the state by escheat.—Estate of Miner, 143 Cal. 194, 76 Pac. 968. The state can not maintain a claim to an estate, by way of escheat or otherwise, if the next of kin show their right to inherit, as it is not the policy of the state to

absorb private property, if the legal heirs of a decedent are discovered.—In *re Sullivan's Estate*, 48 Wash. 631, 94, Pac. 483, 486, 95 Pac. 71. The state has power, through the instrumentality of a statute, to prevent an unjust escheat to it, by validating an unattested will.—*Estate of Sticknoth*, 7 Nev. 223, 229. The property of an intestate who died without heirs escheats to the state.—In *re McClellan's Estate*, 38 S. D. 588, 162 N. W. 383. The intent of the escheat statute is that if there are no heirs entitled to succeed to the estate, then and only in that case, the property of the deceased person escheats to the state; there is nothing in the language of the statute implying a cutting out from the succession the heir next in line to the non-resident foreign heir who fails to make application to succeed.—*Connolly v. Probate Court for Kootenai County*, 25 Ida. 35, 136 Pac. 205.

#### REFERENCES.

Property and estate escheat to the state when.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1406. Property escheated is subject to charges, as other property.—See note *Kerr's Cal. Cyc. Civ. Code*, § 1407. Escheat.—See note 12 *L. R. A.* 529-533.

2. Jurisdiction of courts.—Determining whether property has escheated to the state, and deciding the questions involved in such a proceeding, constitute no part of the ordinary duties of a probate court; but the statute provides a method of procedure by which it may be judicially determined that the property of an intestate dying without heirs has escheated to the state. Any proceeding, however, commenced for that purpose must necessarily be in subordination to the rules of law essential to the orderly administration of justice. And the escheat law does not undertake to interfere in any way with the jurisdiction of courts in probate matters. It nowhere provides that the filing of an information in one court to escheat personal property of the decedent will oust another court of a previously acquired jurisdiction to settle the estate of the deceased, or vest in one court the right to determine questions which, by law, belong exclusively to another court. A circuit court would therefore have no authority to make an order requiring those found by a county court to be the heirs of decedent to turn over to a receiver in escheat proceedings the property distributed to them by an administrator under direction of the county court.—*State v. O'Day*, 41 Or. 495, 69 Pac. 542, 545. The decree of a probate court, that the affairs of an estate have been finally settled, and that there are no heirs, or other claimants thereof, and ordering that "the county treasurer of this city and county forthwith pay into the state treasury all moneys and effects in his hands belonging to said estate," does not have the effect of a judgment so as to vest the title in the state, *ipso facto*, and without the necessity of an action in the nature of an escheat.—*Estate of Miner*, 143 Cal. 194, 196, 76 Pac. 968. After an allotment to a non-resident minor heir at law of the intestate, a probate court has no power to direct that such share shall, in case of

the non-resident heir's failure to appear and claim it within a year, be distributed among the other heirs.—*Pyatt v. Brockman*, 6 Cal. 418. The jurisdiction of the county courts in probate in the state of Oregon is derived from the constitution and the legislature has no power to deprive them thereof, and any attempt to do so is unconstitutional and void and the determination of heirship as to personalty is part of the primary and fundamental jurisdiction of those courts.—*State v. McDonald*, 55 Or. 419, 104 Pac. 972. The circuit court of Oregon has jurisdiction to adjudicate upon the devolution of the title to realty, which the action of the county court can not effect.—*State v. McDonald*, 55 Or. 419, 104 Pac. 972.

3. **Property of outlawed corporations.**—It was not the intention of the statute of Idaho, passed in 1903, and relating to corporations which failed to comply with the requirements thereof, to provide for or to declare a legislative forfeiture of previously acquired titles, and the act contained no provision for a judicial determination of forfeiture; but if a forfeiture had been intended, and had actually taken place, the property of the corporation, where it failed to comply with the law, would have escheated to the state, subject to the payments of the debts of the corporation, and not to any private party; and such escheat or forfeiture could not avail one who could not claim his title from or through the state, but claims title from the general government.—*War Eagle, etc., Min. Co. v. Dickie*, 14 Ida. 534, 94 Pac. 1034, 1036.

4. **Land of Mormon Church.**—Under section 3 of the act of congress of July 1, 1862, which act was intended to affect only the rights and interests of the Mormon Church in Utah, and which declared that all real estate acquired or held in any territory of the United States by any corporation or association for religious or charitable purposes of greater value than fifty thousand dollars should be forfeited and escheated to the United States, but which section provided that the existing vested rights in real estate should not be impaired by the provisions of the act, it is evident that it was not the intention of the government, by its legislation, to distribute, or in any manner to interfere with, and interest, whatever the nature thereof might be, which had been acquired prior to the passage of the act. The act looked to the future only. Hence the possessory rights of the several occupants, including the church, in lots of the city of Salt Lake, together with the improvements thereon at the time of the passage of the act, were preserved unimpaired, and such property was not subject to forfeiture or escheat under the provisions of the act.—*United States v. Tithing Yard and Officers*, 9 Utah, 273, 34 Pac. 55.

5. **Aliens.**—Aliens can acquire title to real property by purchase, or other act of the party, and hold the same until "office found"; that is, until an official determination of the matter by the government upon an inquisition held for that purpose. Until then no individual can question the rights of the claimant on the ground of his alienage and

non-residence, either collaterally in an action of ejectment, or directly in any other way.—*Ramires v. Kent*, 2 Cal. 558; *People v. Folsom*, 5 Cal. 373; *Norris v. Hoyt*, 18 Cal. 217. At common law, an alien might take land by deed, and hold the same as against all persons whomsoever, subject only to the right of the state to claim it by escheat upon "office found," or by some other act or procedure equivalent thereto; and until such action is taken by the state, the alien might dispose of his interest in the realty, either by conveyance or devise, and his grantees or devisees would thereupon acquire title notwithstanding his alienage. An alien could neither take nor transmit real property by descent, having no inheritable blood. If he died intestate without having made conveyance of the land acquired by deed, the same immediately vested by escheat in the state, without any inquest. An alien may purchase lands or take them by devise and hold them against all the world but the state. Nor can he be divested of his estate even by the state, until after a formal proceeding called "office found"; and, until that is done, may sell and convey or devise the land and pass a good title to the same.—*Abrams v. State*, 45 Wash. 327, 122 Am. St. Rep. 914, 13 Ann. Cas. 527, 9 L. R. A. (N. S.) 186, 88 Pac. 327, 329. Though the state may declare an escheat of land conveyed to an alien while he holds it, it loses that right after he has conveyed the land to a citizen for a good and valuable consideration.—*State v. World Real Estate, etc., Co.*, 46 Wash. 104, 89 Pac. 471. Where the statute provides that a non-resident alien, who takes by succession, must appear and claim the property within five years, and declares that no non-resident foreigner can take by succession unless he claims the property within five years, that portion of the estate to which the non-resident would be entitled if he claimed it in five years, but which he does not so claim, vests in the state, not strictly by escheat for want of heirs, but by virtue of the effect of the statute. It does not return to the estate to be distributed to the other heirs.—*Estate of Pendergast*, 143 Cal. 135, 76 Pac. 962. The state may escheat the property of an alien during his life, but after his death it descends to his heirs.—*Abrams v. State*, 45 Wash. 327, 122 Am. St. Rep. 914, 13 Ann. Cas. 527, 9 L. R. A. (N. S.) 186, 88 Pac. 327, 332.

## REFERENCES.

Termination of right to declare escheat by death of alien or transfer in his lifetime: See note 12 L. R. A. (N. S.) 186.

6. Premature action.—A statute requiring the alien to "appear and claim the property" relates to an appearance and claim, to be proved by acts within the state indicating that the alien asserts right to it; but a non-resident alien has a full five years within which "to appear and claim" the property. Hence a proceeding brought by the attorney-general to escheat the property of a non-resident alien is premature if instituted within five years after the death of the intestate.—*State v.*

Probate Law—9



Smith, 70 Cal. 153, 12 Pac. 121, 123; *People v. Roach*, 76 Cal. 294, 18 Pac. 407; *State v. Miller*, 149 Cal. 208, 85 Pac. 609.

7. *Non-resident aliens.*—Under our law of succession, the title to the estate of a person dying intestate vests in the heirs, whether known or unknown, immediately upon his death. In the case of non-resident alien heirs, this title becomes barred on forfeiture, at the end of five years from the death of the deceased, unless within that time such heir appears and claims the property. And this occurs without any judicial proceedings, and even if the heirs are well known. The resident heirs, however, are not barred, *ipso facto*, by any statutory forfeiture. They can be barred only by judgment in a proceeding by information, and then only after the lapse of twenty years from the judgment.—*State v. Miller*, 149 Cal. 208, 85 Pac. 609. Escheat takes place only in cases in which no heir comes forward to make his claim to the succession; and non-residence or alienage is no bar to such claim, provided the person concerned is diligent in asserting his right after having due notice of it.—*Connolly v. Probate Court for Kootenai County*, 25 Ida. 35, 136 Pac. 205.

8. *Of deposits in national banks.*—The statute of Oregon providing for the escheat to the state of deposits in national banks unclaimed for seven years is not unconstitutional as being in violation of the United States laws against "visitorial" legislation by the states.—*State v. First Nat. Bank*, 61 Or. 551, Ann. Cas. 1914B, 153, 123 Pac. 712, 714. The right of the state to escheat and hold the property of absentee depositors in a bank is as ample and rests upon as sound reasons of public policy as its right to escheat the property of persons who have died leaving no known heirs.—*State v. First Nat. Bank*, 61 Or. 551, Ann. Cas. 1914B, 153, 123 Pac. 712, 714. A proceeding to escheat to the state certain unclaimed deposits in a national bank is quasi in rem; hence, no precedent seizure of the property is necessary, and a judgment escheating the property in such a proceeding operates to release the bank from liability to its depositor.—*State v. First Nat. Bank*, 61 Or. 551, 555, Ann. Cas. 1914B, 153, 123 Pac. 712.

#### REFERENCES.

Escheat of bank deposits.—Ann. Cas. 1914B, 157.

9. *Pleading and practice.*—Under a statute regulating proceedings by the attorney-general for the forfeiture of escheated estates, and providing that the information must set forth the facts in consequence of which the estate is claimed to have escheated, with an allegation that by reason thereof the state has a right to the estate, it is sufficient allegation in an information, as against resident heirs, that there are no heirs to take the estate; and it is a sufficient allegation as to non-resident alien heirs that five years have elapsed within which no such heirs have appeared to claim the estate.—*State v. Miller*, 149 Cal. 208, 85 Pac. 609. Where the statute provides that all persons named in the information, or any person claiming an interest in the estate, may

appear and answer, and that if no such person does appear, judgment must be rendered that the state is the owner of the property, the failure of claimants to appear is sufficient to support a judgment of forfeiture in an escheat proceeding; and it is not necessary to offer any evidence in support of the allegation that there are no heirs.—*State v. Miller*, 149 Cal. 208, 85 Pac. 609, 611. The real purpose and effect of the proceeding, with regard to unknown heirs, is, not to establish, by ordinary modes of proof, the known existence of heirs, but merely to make a statutory, prima facie showing of failure of heirs, in order to start the running, as against such known appearing heirs, of the period of twenty years after which such heirs will be barred, if not under legal disability; otherwise, within five years after such disability ceases.—*State v. Miller*, 149 Cal. 208, 85 Pac. 609, 611. Where the state has no right whatever in the land at the time of the commencement of an action, and this is shown by its answer in intervention, such answer does not state a cause of action to escheat the lands to the state.—*State v. Ellis* (Kan.), 79 Pac. 1066, 1133. Although an information alleging the escheat of the estate of an intestate contains an averment that the estate is being badly managed by the administrator, the court has no power to compel the administrator to turn over the personal estate to a receiver that has been appointed by the court. The statute relating to escheats nowhere contemplates, even when a receiver is appointed, that he shall be the custodian of the estate beyond the realty, and rents and profits thereof, but expressly provides that the administrator shall proceed to settle the estate as in other cases.—*Territory v. Forrest*, 1 Ariz. 49, 25 Pac. 527. The state is an "interested party" in the matter of the distribution of an intestate's estate to the extent that it may appear on the hearing of an application for an order of distribution to claim that the decedent left no heirs, before the right of the state has been determined in an escheat action.—*In re Estate of McClellan*, 31 S. D. 641, 653, 141 N. W. 965. See, also, *In re McClellan's Estate*, 27 S. D. 109, Ann. Cas. 1913C, 1029, 129 N. W. 1037. Under the provisions of section 5716, Rev. Codes of Idaho, the personal property of the deceased, when succession is not claimed as provided by that section, may be reduced to the possession of the state to be disposed of as provided by such section.—*Connolly v. Probate Court*, 25 Ida. 35, 136 Pac. 205, 210. Where, in escheat proceedings, the claimants or defendants proceed to a joint trial without objection they are not in a position to claim a separate trial on appeal.—*State v. McDonald*, 55 Or. 419, 104 Pac. 971. A proceeding to escheat the property of a deceased person for want of heirs, under the statute of Oregon, is a proceeding at law and not in equity.—*State v. McDonald*, 55 Or. 419, 104 Pac. 973. The statutory provisions of Washington, as to escheat, show that it can be defeated only by the appearance of heirs who establish their claim; notwithstanding a presumption that every decedent leaves some person somewhere as next of kin, no presumption goes to the making of any particular claimant that person, and to

defeat the escheat and take by descent, the claimant must prove that he is that person, the burden being continually on him.—*In re Miller's Estate*, 87 Wash. 64, 151 Pac. 105. On the death of a person intestate and, so far as known, without heirs the escheat actually "occurs or takes place, or becomes vested" at once, and the right instantly accrues to the sovereign power as "the last heir"; the proceedings required by law in the nature of office found are merely proceedings to establish that right by legal proof, which has already accrued or become vested or fixed.—*United States v. Fish*, 5 Alaska 31, 35.

10. *Judgments*.—Escheat proceedings should not be commenced, or if commenced, should not be adjudicated, until the administration of the estate has been concluded, and the debts and liabilities of the estate, and the costs and expenses of administration, have been paid.—*State v. Simmons*, 46 Or. 159, 79 Pac. 498. A statute authorizing the attorney-general to institute an investigation for the recovery of property which has escheated, or should escheat, to the state, and giving him full power and authority to cite any and all persons before any of the superior courts of the state to answer investigations, and to render accounts concerning said property, real or personal, and to examine books and papers of any and all corporations, contemplates no other judgment as the result of the investigation for discovery than an adjudication or declaration that the person cited has or has not fully answered all questions propounded to him; has, if ordered to render any, rendered full, true, and just accounts; and if so ordered, has submitted all his books and papers, without concealment.—*People v. Hibernia Sav. & L. Soc.*, 72 Cal. 21, 13 Pac. 48, 50. A judgment that an administrator deliver the property involved to the sheriff can not be rendered until the state alleges and shows, and the court finds, that all claims and demands against the estate, and all costs and expenses of administration have been fully paid and discharged, and that the estate has been settled. Any other rule would lead to conflict of jurisdiction and confusion.—*State v. Simmons*, 46 Or. 159, 79 Pac. 498. A statutory provision for a trial must be taken to refer solely to the issue between the claimant and the state concerning the share claimed by such person, and not to the right of the state against persons not appearing. The meaning and effect of such a statute is, that if, on the trial of such issue, the proof shows that the claimant is not an heir, nor entitled to the estate, or some share thereof, then such claimant must fail, and judgment must thereupon go in favor of the state, for the whole of the property described, although there may be no proof of the non-residence of heirs, other than the constructive proof afforded by the fact that no heir or person entitled has appeared. If the statute is silent in regard to the effect of a finding that the person appearing is entitled to a part of the estate, it is obvious that, in such event, there should be a judgment in his favor for such share.—*State v. Miller*, 149 Cal. 208, 85 Pac. 609. If no person appear and answer within the time prescribed by the statute, then judgment must be rendered that the

state be seised of the property claimed in the information.—*State v. Miller*, 149 Cal. 208, 85 Pac. 609.

11. *Limitation of actions.*—The twenty-year limitation prescribed by statute within which to file a petition to determine one's right to escheated property is exclusive, and no reference need be made to the limitations prescribed for ordinary actions.—*In re Pomeroy's Petition*, 33 Mont. 69, 81 Pac. 629.

12. *Recovery of escheated property, and proceedings therefor.*—Where the object of an action is to identify the petitioners as the heirs of the intestate, and to entitle them to recover money escheated to the state, it indicates a legal inquiry for which the proceeding was instituted, and which courts of law are competent to try. The proceeding, therefore, is one at law.—*Fenstermacher v. State*, 19 Or. 504, 25 Pac. 142. In an action against the state to recover escheated property of a person who died intestate, and without known heirs, declarations of the deceased concerning his past life and history are, ex necessitate, and as a matter of common sense, admissible to identify him as a relative of plaintiff. If they were not admitted, there would be, in many cases, a failure of justice.—*Young v. State*, 36 Or. 417, 47 L. R. A. 548, 59 Pac. 812, 60 Pac. 711. In an action to recover the proceeds of escheated property, it is proper to deduct from the fund the total expense of the state in defending and preserving it, including the fees of special counsel employed by the state.—*Young v. State*, 36 Or. 417, 47 L. R. A. 548, 59 Pac. 812, 814, 60 Pac. 711. In an action to recover the proceeds of escheated property, the court has authority to deduct from the fund the total expense of the state in defending it, although the answer of the state to the petition is defective because it does not allege that any expense had been incurred.—*Young v. State*, 36 Or. 417, 47 L. R. A. 548, 59 Pac. 812, 814, 60 Pac. 711. In an action against the state to recover the proceeds of escheated lands, the claimant, on recovering a judgment therefor, from which the state appeals, is not entitled to interest on the sum allowed from the time of the demand until the judgment is affirmed. And if, on the trial of such an action, the court grants an extra allowance as attorneys' fees, such allowance will not be increased on appeal, in the absence of a showing as to the reasonable value of the services performed.—*Young v. State*, 36 Or. 417, 47 L. R. A. 548, 60 Pac. 711. In Montana, property reduced to possession by the state in escheat proceedings, prior to the enactment of the Code of Civil Procedure, can not be recovered by the heir in a proceeding under such code.—*In re Pomeroy's Petition*, 33 Mont. 69, 81 Pac. 629. A statute which grants the right of succession to aliens, and provides a mode by which non-resident aliens may be compensated out of the treasury of the state for property of their ancestor which has been converted, and the proceeds of which have been paid to the state treasurer, has no application to a case in which a citizen of the United States appears as a claimant.—*In re Pomeroy's Petition*, 33 Mont. 69, 81 Pac. 629, 630. The state may maintain any

action, suit, or proceeding necessary to recover the possession of any property, upon which the law of escheats is operative, or for the enforcement or protection of its rights on account thereof, in like manner and with like effect as any natural person.—*State v. Butts*, 78 Or. 173, 151 Pac. 722. Formerly, a citizen of the United States, claiming, as heir of the deceased owner, property reduced to possession, by the state, under the escheat laws contained in the Montana Compiled Statutes of 1887, could obtain no relief save through section 7359, Revised Codes, which was not retroactive; but in 1913 an act was passed whereby heirs, left without relief by the section, were given a year after the passage of the act within which to file their petitions.—*In re Pomeroy*, 51 Mont. 119, 151 Pac. 333.

#### REFERENCES.

Proceedings to escheat property to state.—See note *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1269-1272. Proceedings against defaulters having money or property belonging to the state, by escheat or otherwise.—See *Kerr's Cal. Cyc. Pol. Code*, § 437, and notes.

## PART II.

### GUARDIAN AND WARD

#### CHAPTER I.

##### GUARDIANSHIP OF MINORS.

- § 52. Guardian, what.
- § 53. Ward, what.
- § 54. Kinds of guardians.
- § 55. General guardian, what.
- § 56. Special guardian, what.
- § 57. Appointment by will.
- § 58. Awarding custody. Appointment of general guardian.
- § 59. Form. Petition for writ of habeas corpus for detention of child.
- § 60. Form. Writ of habeas corpus.
- § 61. Form. Return to writ of habeas corpus.
- § 62. Relation confidential.
- § 63. Guardian is under direction of court.
- § 64. Death of a joint guardian.
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- § 67. Suspension of power of guardian.
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##### MINORS AND THEIR CUSTODY, GUARDIANS, COMMITMENT, HABEAS CORPUS, AND CONTRACTS.

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| <ul style="list-style-type: none"> <li>1. Kinds of guardians.</li> <li>2. Right to guardianship and appointment.               <ul style="list-style-type: none"> <li>(1) Natural right of parents.</li> <li>(2) Deprivation of custody.</li> <li>(3) Regaining of custody.</li> <li>(4) Abandonment.</li> <li>(5) Where parents are living apart.</li> <li>(6) Appointment of guardian and bond.</li> <li>(7) Jurisdiction of courts.</li> <li>(8) Illegitimate children.</li> <li>(9) Joint guardianship.</li> <li>(10) Collateral attack on appointment.</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>(11) Appeal and trial de novo.</li> <li>3. Testamentary guardian.               <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) Guardian appointed by deed is.</li> <li>(3) Mother's incapacity to appoint.</li> <li>(4) Mother's consent to father's appointment.</li> <li>(5) Welfare of child.</li> <li>(6) Powers of. Validity of acts.</li> </ul> </li> <li>4. Commitment of infants.               <ul style="list-style-type: none"> <li>(1) Juvenile court law.</li> <li>(2) Nature of proceedings.</li> <li>(3) Abandonment.</li> <li>(4) Welfare of child.</li> </ul> </li> </ul> |
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- (5) Jurisdiction of courts.
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- (9) Habeas corpus if jurisdiction is lacking.
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### § 52. Guardian, what.

A guardian is a person appointed to take care of the person or property of another.—*Kerr's Cyc. Civ. Code*, § 236.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 1117.

Montana\*—Revised Codes of 1907, section 3773.

North Dakota\*—Compiled Laws of 1913, section 4451.

Oklahoma\*—Revised Laws of 1910, section 3321.

South Dakota\*—Compiled Laws of 1913, section 2632.

### § 53. Ward, what.

The person over whom or over whose property a guardian is appointed is called his ward.—*Kerr's Cyc. Civ. Code*, § 237.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Montana\*—Revised Codes of 1907, section 3774.

North Dakota\*—Compiled Laws of 1913, section 4452.

Oklahoma\*—Revised Laws of 1910, section 3322.

South Dakota\*—Compiled Laws of 1913, section 2633.

**§ 54. Kinds of guardians.**

Guardians are either: 1. General; or, 2. Special.—*Kerr's Cyc. Civ. Code*, § 238.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Montana\*—Revised Codes of 1907, section 3775.

North Dakota\*—Compiled Laws of 1913, section 4453.

Oklahoma\*—Revised Laws of 1910, section 3323.

South Dakota\*—Compiled Laws of 1913, section 2634.

**§ 55. General guardian, what.**

A general guardian is a guardian of the person, or of all the property of the ward within this state, or of both.—*Kerr's Cyc. Civ. Code*, § 239.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1117.

Montana\*—Revised Codes of 1907, section 3776.

North Dakota\*—Compiled Laws of 1913, section 4454.

Oklahoma\*—Revised Laws of 1910, section 3324.

South Dakota\*—Compiled Laws of 1913, section 2635.

Utah—Compiled Laws of 1907, section 3983.

**§ 56. Special guardian, what.**

Every other is a special guardian.—*Kerr's Cyc. Civ. Code*, § 240.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1117.

Montana\*—Revised Codes of 1907, section 3777.

North Dakota\*—Compiled Laws of 1913, section 4455.

Oklahoma\*—Revised Laws of 1910, section 3325.

South Dakota\*—Compiled Laws of 1913, section 2636.

Utah—Compiled Laws of 1907, section 3983.

**§ 57. Appointment by will.**

A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing:

1. If the child be legitimate, by the father, with the



written consent of the mother; or by either parent, if the other be dead or incapable of consent.

2. If the child be illegitimate, by the mother.—*Kerr's Cyc. Civ. Code*, § 241.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1724.  
 Arizona\*—Revised Statutes of 1913, paragraph 1118.  
 Colorado—Mills's Statutes of 1912, section 3339.  
 Hawaii—Revised Laws of 1915, section 3020.  
 Idaho\*—Compiled Statutes of 1919, section 7853.  
 Kansas—General Statutes of 1915, section 5042.  
 Montana\*—Revised Codes of 1907, section 3778.  
 New Mexico—Statutes of 1915, section 2559.  
 North Dakota\*—Compiled Laws of 1913, section 4456.  
 Oklahoma\*—Revised Laws of 1910, section 3326.  
 Oregon—Lord's Oregon Laws, section 1316.  
 South Dakota\*—Compiled Laws of 1913, section 2637.  
 Utah—Compiled Laws of 1907, section 3984.  
 Washington—Laws of 1917, chapter 156, page 703, section 210.

#### § 58. Awarding custody. Appointment of general guardian.

In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations:

1. By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference determining the question;

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father;

3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows:

(1) To a parent;

(2) To one who was indicated by the wishes of a deceased parent;

(3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;

(4) To a relative.

4. Any parent who knowingly or wilfully abandons, or having the ability so to do, fails to maintain his minor child under the age of fourteen years, forfeits the guardianship of such child; and any parent or guardian who knowingly permits his child or ward to remain for the space of one year in any orphan asylum of this state, wherein such child is supported by charity, and who, during such period, fails to give notice in writing to the managers or officers of such asylum that he is such parent or guardian, abandons and forever forfeits all right to the guardianship, care, custody, and control of such child. The officers and managers of any orphan asylum having any such abandoned child in its care have the preferred right to the guardianship of such child.—*Kerr's Cyc. Civ. Code*, § 246.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 1122.

Colorado—Mills's Statutes of 1912, sections 3337, 3338.

Hawaii—Revised Laws of 1915, section 3017.

Montana—Revised Codes of 1907, section 3783.

New Mexico—Statutes of 1915, sections 2554, 2582, 2584.

North Dakota—Compiled Laws of 1913, sections 4461, 4462.

Oklahoma—Revised Laws of 1910, sections 3331, 3332.

South Dakota—Compiled Laws of 1913, section 2642.

Utah—Compiled Laws of 1907, section 3995.

#### § 59. Form. Petition for writ of habeas corpus for detention of child.

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.] }

To the Honorable —, Judge of the — Court of the  
County <sup>2</sup> of —, State of —.

The petition of —, the undersigned, respectfully shows:

That the petitioner is a resident of the county <sup>3</sup> of —, state of —; that he resides in the town <sup>4</sup> of —; and that he is engaged in the business of —, in said town;<sup>5</sup>

That on the — day of —, 19—, said petitioner was married to —, at —, in the county <sup>6</sup> of —, state of —, and that on the — day of —, 19—, a child, namely, —,<sup>7</sup> was born as the issue of such marriage;

That on the — day of —, 19—, the said child was taken from the custody of your petitioner, its father, —;<sup>8</sup> that said child is an infant of tender years; and that it is now unlawfully imprisoned, detained, confined, and restrained of its liberty by —,<sup>9</sup> at —,<sup>10</sup> in the county <sup>11</sup> of —, state of —;

That said infant has not been committed, nor is it detained by virtue of any process or mandate issued by any court of the United States, or of any judge thereof, nor is it committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal, made in a special proceeding instituted for any cause, nor by virtue of an execution or other process issued upon such a judgment, decree, or final order, according to the best knowledge or belief of your petitioner;

That the imprisonment and restraint of said infant is illegal; and that the illegality thereof consists in this, to wit:<sup>12</sup>

That your petitioner is entitled by law to the absolute and exclusive control of the said child;

That your petitioner is a fit and proper person to have the care, custody, and control of said child, and is pecuniarily able to provide for its support, maintenance, and education; but that the said — is financially unable to suitably provide for the support, maintenance, and education of said child;

That no previous application has been made by me for a writ of habeas corpus to secure the custody of such child.

Wherefore your petitioner prays that a writ of habeas corpus issue to the said —, commanding her <sup>13</sup> to produce my said child, —, before your honor, at a time and place therein to be specified, together with the cause of its imprisonment and restraint; and that your honor make an order herein awarding to me the custody of my said child, and for such other and further relief as to your honor may seem just and proper. And your petitioner will ever pray, etc. —, Petitioner.

[Add ordinary verification.]

Explanatory notes.—1 As, "In the Matter of the Application of — for a Writ of Habeas Corpus, for the Custody of —, an Infant." 2, 3 Or, city and county. 4, 5 Or as the case may be. 6 Or, city and county. 7 Give its name. 8 State how, in detail. 9, 10 State by whom, and the place where, naming all the parties, if they are known, or describing them, if they are not known. 11 Or, city and county. 12 That the father has been deprived of his lawful custody of the child without his consent; that it is his duty to care for it; and that the child, where it is, is subject to unfit, improper, and harmful influences, etc. 13 Or as the case may be.

#### § 60. Form. Writ of habeas corpus.

[Title of court.]

[Title of matter.]<sup>1</sup>

{ No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

The People of the State of —.

To —,<sup>3</sup> greeting.

We command you, That you have the body of —,<sup>4</sup> by you imprisoned, detained, and restrained, as it is alleged, by whatsoever name said —<sup>5</sup> shall be called or charged, before —,<sup>6</sup> judge of the — court of — county,<sup>7</sup> state of —, at the court-room of said court, at —,<sup>8</sup> in said county<sup>9</sup> and state, on the — day of —, 19—, at — o'clock, in the afternoon<sup>10</sup> of that day, to do and receive what shall then and there be considered concerning the said —;<sup>11</sup> and have you then and there this writ.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> As, "In the Matter," etc. <sup>2</sup> Give file number. <sup>3</sup> Name of respondent, and residence. <sup>4, 5</sup> Name the infant. <sup>6</sup> Name of judge. <sup>7</sup> Or, city and county. <sup>8</sup> Give location of court-room. <sup>9</sup> Or, city and county. <sup>10</sup> Or as the case may be. <sup>11</sup> Name of infant.

**§ 61. Form. Return to writ of habeas corpus.**

[Title of court.]

[Title of matter.]<sup>1</sup>

{ No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

In obedience to the writ of habeas corpus issued therein, and directed to me, I, the undersigned, hereby certify and make return as follows, to wit:

I admit the marriage, and the birth of the child, as stated in the petition for said writ; but I deny that petitioner is entitled by law to the absolute and exclusive control of said child; and deny that it is illegally imprisoned, detained, or restrained of its liberty; and deny that, by reason of my custody thereof, it is subjected to unfit, improper, or harmful influences.

I admit that said child is of tender years; but allege that I am its mother, and that said child is of that tender age at which the care and control of a mother is especially needed.<sup>3</sup>

Wherefore your respondent prays that the said writ of habeas corpus be dismissed. —

Dated —, 19—.

[Add ordinary verification.]

Explanatory notes.—<sup>1</sup> As, "In the Matter," etc. <sup>2</sup> Give file number. <sup>3</sup> State reasons, in detail, and in separate paragraphs, why the child should remain where it is; the financial ability of its custodians to provide for its maintenance, support, and education; reasons why the child's father should not have its custody; and any other facts showing that the welfare of the child will be promoted by leaving it in respondent's custody. Or, if the custody is denied, say: "In obedience to the within [or annexed] writ, I certify and return that neither at the time of the allowance of said writ, nor at any time since, has the said — been in my custody; that at no time have I imprisoned the said —, or restrained him of his liberty; and that he is not now imprisoned or restrained by me; wherefore I can not have his body before the judge of the court, as by said writ I am commanded."

**§ 62. Relation confidential.**

The relation of guardian and ward is confidential, and is subject to the provisions of the title on trust.—*Kerr's Cyc. Civ. Code*, § 250.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Montana\*—Revised Codes of 1907, section 3787.

North Dakota\*—Compiled Laws of 1913, section 4466.

South Dakota\*—Compiled Laws of 1913, section 2647.

**§ 63. Guardian is under direction of court.**

In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court.—*Kerr's Cyc. Civ. Code*, § 251.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Kansas—General Statutes of 1915, sections 5050, 6107.

Montana\*—Revised Codes of 1907, section 3788.

North Dakota\*—Compiled Laws of 1913, section 4467.

Oklahoma\*—Revised Laws of 1910, section 3330.

South Dakota\*—Compiled Laws of 1913, section 2648.

**§ 64. Death of a joint guardian.**

On the death of one of two or more joint guardians, the power continues to the survivor, until a further appointment is made by the court.—*Kerr's Cyc. Civ. Code*, § 252.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1126.

Montana\*—Revised Codes of 1907, section 3789.

North Dakota\*—Compiled Laws of 1913, section 4468.

Oklahoma\*—Revised Laws of 1910, section 3336.

South Dakota\*—Compiled Laws of 1913, section 2649.

Utah—Compiled Laws of 1907, section 3987.

**§ 65. Removal of guardian.**

A guardian may be removed by the superior court for any of the following causes:

1. For abuse of his trust;
2. For continued failure to perform its [his] duties;

3. For incapacity to perform its [his] duties;
4. For gross immorality;
5. For having an interest adverse to the faithful performance of his duties;
6. For removal from the state;
7. In the case of a guardian of the property, for insolvency; or,
8. When it is no longer proper that the ward should be under guardianship.—*Kerr's Cyc. Civ. Code*, § 253.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1127.

Montana\*—Revised Codes of 1907, section 3790.

New Mexico—Statutes of 1915, section 2556.

North Dakota\*—Compiled Laws of 1913, section 4469.

Oklahoma\*—Revised Laws of 1910, section 3337.

South Dakota\*—Compiled Laws of 1913, section 2650.

Utah—Compiled Laws of 1907, section 3991.

#### § 66. Guardian appointed by parent, how superseded.

The power of a guardian appointed by a parent is superseded:

1. By his removal, as provided by section two hundred and fifty-three;
2. By solemnized marriage of the ward; or,
3. By the ward's attaining majority.—*Kerr's Cyc. Civ. Code*, § 254.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1128.

Montana\*—Revised Codes of 1907, section 3791.

North Dakota\*—Compiled Laws of 1913, section 4470.

Oklahoma\*—Revised Laws of 1910, section 3338.

South Dakota\*—Compiled Laws of 1913, section 2651.

Utah—Compiled Laws of 1907, section 3996.

#### § 67. Suspension of power of guardian.

The power of a guardian appointed by a court, is suspended only:

1. By order of the court; or,

2. If the appointment was made solely because of the ward's minority, by his attaining majority; or,
3. The guardianship over the person of the ward, by the marriage of the ward.—*Kerr's Cyc. Civ. Code*, § 255.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 1129.  
Montana\*—Revised Codes of 1907, section 3792.  
North Dakota\*—Compiled Laws of 1913, section 4471.  
Oklahoma\*—Revised Laws of 1910, section 3339.  
South Dakota\*—Compiled Laws of 1913, section 2652.

**§ 68. Release by ward.**

After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence.—*Kerr's Cyc. Civ. Code*, § 256.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Montana\*—Revised Codes of 1907, section 3793.  
North Dakota\*—Compiled Laws of 1913, section 4472.  
Oklahoma\*—Revised Laws of 1910, section 3340.  
South Dakota\*—Compiled Laws of 1913, section 2653.  
Utah\*—Compiled Laws of 1907, section 3997.

**§ 69. Guardian's discharge.**

A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority.—*Kerr's Cyc. Civ. Code*, § 257.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Hawaii—Revised Laws of 1915, sections 3042, 3043.  
Montana\*—Revised Codes of 1907, section 3794.  
North Dakota\*—Compiled Laws of 1913, section 4473.  
Oklahoma\*—Revised Laws of 1910, section 3341.  
South Dakota\*—Compiled Laws of 1913, section 2654.  
Utah\*—Compiled Laws of 1907, section 3998.



**MINORS AND THEIR CUSTODY, GUARDIANS, COMMITMENT, HABEAS CORPUS, AND CONTRACTS.**

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|   | 12. Actions.                                 |

1. Kinds of guardians.—At common law there were four kinds of guardians, namely: 1. By nature; 2. For nurture; 3. In Socage; and 4. In chivalry.—*Lord v. Hough*, 37 Cal. 657, 660. But, here, guardians are either general or special; a general guardian, in this state, being a guardian of the person, or of all the property of the ward, or both; and every other being a special guardian.—See Civil Code of California, §§ 238, 239, 240. The guardianship by nature extends only to the custody of the person of the ward, and not to his property. To entitle the guardian to manage the property of his ward, he must

be duly appointed by some competent authority. So guardianship by nurture extends only to the person, and determines when the infant arrives at the age of fourteen.—*Kendall v. Miller*, 9 Cal. 591, 592. If a father abandon his child under the age of fourteen, he forfeits his guardianship, and can no longer claim custody of the child.—*In re Vance*, 92 Cal. 195, 28 Pac. 229. One who wrongfully intermeddles with the property of an infant is sometimes held by equity as a guardian, but only, as in the case of an administrator *de son tort*, for the purpose of accounting; he acquires none of the rights of a guardian.—*Aldrich v. Willis*, 55 Cal. 81, 85.

#### REFERENCES.

Guardian ad litem. See note post, on guardians ad litem, following § 1076.

#### 2. Right to guardianship and appointment.

(1) Natural right of parents.—While either one of them is competent, and not unsuitable, parents are absolutely entitled to the guardianship of their minor children, and the surrender of the right may be made only in the manner prescribed by statute.—Application of *Martin*, 29 Ida. 716, 161 Pac. 573. Prima facie a parent is presumed to be competent, and he is entitled to have the custody of his child unless found by the court to be incompetent.—*Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874. The right of a parent to the custody and control of a child is not an absolute and uncontrollable right, like a right in property, and will never be enforced when it is apparent that its enforcement is against the best interests and happiness of the child.—*People (ex rel. Broxholm) v. Parks*, 57 Colo. 458, 141 Pac. 994. The law gives to a father the paramount right to the custody of his minor child; this right, however, is not absolute, but qualified, and must bend to whatever may be found to be for the best permanent interest of the child; neither the father nor the mother has any rights that can be allowed to militate seriously against the welfare of the child; where a child's mother died within a few days after its birth, and the father, in a few years, married again, and sought the custody of his child, as against maternal relatives, with whom he had left it, he has a paramount right, where all the parties concerned are of excellent character, and are able, willing, and ready to do what they think best for the child's welfare, and the father's contract consenting that the maternal relatives might have custody of the child should have little weight against the contention of the father, where it does not appear that he unqualifiedly surrendered his custody and control by such contract.—*Haglund v. Egge* (S. D.), 171 N. W. 212. It is the right of a father, in the discharge of his duty as such, to designate such teachers, in either morals, religion, or literature, as he shall deem best calculated to impart correct instruction to his child, and no teacher, in either religion or any other branch of education, has any authority over the child, except what he desires from its parent or guardian.—*In re*

Guertin's Child, 5 Alaska, 1, 2. The father of minor children is entitled to their guardianship, if he is competent to transact his own business and is not otherwise unsuitable for that trust.—*In re Guardianship of Crocheron*; *Crocheron v. Babington*, 16 Ida. 441, 445, 33 L. R. A. (N. S.) 868, 101 Pac. 741. Unless a mother is shown to be unfit to have the custody of her child, the fact that some one else is appointed guardian, even of the child's person, does not impair her right to have this custody.—*In re Brown*, 98 Kan. 663, 159 Pac. 405. The mother of a child under fourteen is entitled to the child's custody, if she has not abandoned it, and is not unfit by reason of dissoluteness, immorality, unwillingness to labor, or something else not including poverty.—*In re Mathews' Estate*, 174 Cal. 679, 164 Pac. 8. The natural right of the mother to the custody of a child, six years old, is not completely annulled by a divorce decree awarding such custody to the father; and on the father's subsequent death it revives.—*Purdy v. Ernst*, 93 Kan. 157, 160, 143 Pac. 429. There is no error committed in awarding the custody of an infant daughter to her father, the mother being dead, where his unfitness to have such custody and guardianship of his child is not established by clear and convincing evidence.—*In re Underwood*, 103 Kan. 505, 175 Pac. 380; *In re Meyer*, 103 Kan. 671, 175 Pac. 975. In the appointment of a guardian for an infant the latter's welfare is the first consideration; it alone, however, will not prevail over the father's natural and legal right to the guardianship.—*In re Moore's Estate and Guardianship*, 179 Cal. 302, 176 Pac. 461. Where the parents of a minor filed their written waiver of their right to be appointed guardian of said minor, the court was authorized to appoint another person, on the day assigned to make an appointment, notwithstanding their telegraphic withdrawal of such waiver, sent the judge on that date.—*Crosbie v. Brewer (Okla.)*, 158 Pac. 388, 394.

## REFERENCES.

Denial of custody of child to parent for its well-being.—41 L. R. A. (N. S.) 564.

(2) *Deprivation of custody.*—The father has no absolute right to deprive the mother of the care and custody of an infant child simply because he is the father.—*State v. Beslin*, 19 Ida. 185, 191, 112 Pac. 1053. Parents should not be permanently deprived of the custody of their children and of the right to act as their legal guardians, even when the conditions are such as to make the temporary surrender of custody necessary, except in strict accordance with the statutes and under circumstances fully warranting such drastic action.—*Application of Martin*, 29 Ida. 716, 161 Pac. 573. It is only where the legal right of the parent to the custody of his child is not clear that the child can be committed to the custody of another on the ground of welfare; if the parent is competent to transact his or her own business, and is not otherwise unsuitable, the custody of the child is not to be given to another.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. The fact may be

that the child's financial interest tends to its being left in the custody of somebody other than the father, but the law will not recognize this as a reason for depriving a father of his child.—*Matter of Schwartz*, 171 Cal. 633, 154 Pac. 304. A parent, not shown to be unfit personally to care for his infant daughter, can not be deprived of the child merely because others, who have her in their custody, are strongly attached to her and are fit persons to rear her.—*Zeigler v. Dusto*, 103 Kan. 901, 176 Pac. 974. A statute declaring that when certain designated facts exist in relation to a minor child that child becomes an abandoned child, must be strictly construed and is to be applied in those cases only where the existence of those facts and conditions is shown and upon such a showing only is a court justified in making a decree or an order whereby the natural relation between parent and child is destroyed.—*Petition of Kelly*, 25 Cal. App. 651, 657, 145 Pac. 156.—The transfer of the natural right of parents to the care and custody of their children was a proceeding unknown to the common law, and repugnant to its principles, and it had its origin in the civil law, and exists in California only by virtue of statute.—*Petition of Kelly*, 25 Cal. App. 651, 657, 145 Pac. 156. A child's custody should not be awarded to a stranger, rather than its mother, merely upon proof that better material advantages will be secured to it.—*Buchanan v. Buchanan*, 93 Kan. 613, 144 Pac. 840. Where the mother is a fit and proper person to control the custody and education of a minor child, it is entirely without the province of the probate court to substitute its judgment for hers, and determine that she is not properly educating the child for a calling for which the court believes it has a natural talent.—*In re McSwain's Estate*, *McSwain v. Craycroft*, 176 Cal. 280, 160 Pac. 117, 120. The probate court, although vested by section 1747, Cal. Code Civ. Proc., with power to determine what may be necessary or convenient for a minor and its interests, is not authorized to disregard a mother's paramount right under section 1751, Code of Civil Procedure, merely because the child was in a suitable and comfortable home, and its inheritance managed by trustee.—*In re Wise's Estate* (Cal.), 177 Pac. 277, 279. The probate court may not, by merely refusing letters of guardianship to any one, deprive the mother of a minor child of a right to the society of her child and the direction of his life during minority, which is recognized as a natural privilege and is secured to her by solemn enactment.—*In re Wise's Estate* (Cal.), 177 Pac. 277, 279. In a suit by parents for the custody of their child the defendant can not withhold such custody on the ground of the child's having been given to him; "a human being can not be made the subject of a gift."—*Harrison v. Harker*, 44 Utah 541, 142 Pac. 716. A decree which judicially strips the parents of the then present right to the guardianship, care, custody and control of the child, may yield to circumstances, on the court's being made to become satisfied at a proper hearing. The past failure of a parent to provide for his child is not conclusive of his future disposition and ability in that respect.—*Guardianship of Michels*, 170 Cal. 339, 149 Pac. 587.

(3) **Regaining of custody.**—When a father is deprived of the custody and control of a minor child without knowledge of any proceeding in that behalf and without a hearing, he is entitled to be relieved from the judgment or order taken against him because of surprise and through his excusable neglect.—*Bell v. Krauss*, 169 Cal. 387, 146 Pac. 874. If the father of a child, having placed the latter in care of his aunt, endeavors to get it back, and during the period of these endeavors, admits to somebody that he would allow the aunt to keep the child if he was paid a certain amount of money, the statement does not of itself show him to be an unfit person to have the child's custody.—*Matter of Schwartz*, 171 Cal. 633, 154 Pac. 304. A man may, on the death of his wife, leave their one-year-old daughter in the custody of his mother, and yet, being himself an unobjectionable person, be entitled to have her restored to him subsequently.—*In re Morhoff's Guardianship* (Cal.), 178 Pac. 294. Where a father of several children, upon a petition filed by an official of a children's home, has been deprived of their custody, by an order of the county court, and such home has awarded the children to third persons who have adopted them, the father may afterwards, upon the filing of a proper petition, showing that he is, at the time, a proper person to have the care of the children, have the judgment of the county court vacated, and the care and custody of the children restored to him; and notice of the father's petition is sufficient if given to the home alone.—*In re Skowron* (S. D.), 172 N. W. 806. Where the father of two infant children upon the death of their mother, placed them under an agreement with her mother and the father afterwards married and sought the custody of his children, he is, if a fit and proper person, entitled thereto, notwithstanding the agreement; that is not controlling.—*Wood v. Shaw*, 92 Kan. 70, 139 Pac. 1165. Where an illegitimate minor child has been legally adopted by a person other than its mother, such person has full right and power to its custody and control, and there is no statute giving the mother the right to recover such custody and control other than by a proceeding based upon the charge that such person is unfit to have its care, and a petition which contains no such allegation is not sufficient to give the court jurisdiction to restore her child to her.—*State (ex rel. S. D. C. H. Soc.) v. Kelley*, 32 S. D. 526, 143 N. W. 953. The mother of an illegitimate minor child ceases to have the rights of a parent over the custody and control of such child after its legal adoption by another person and can not invoke the jurisdiction of the county court under the rights given by chapter 28, Pol. Code, to regain such custody and control.—*State (ex rel.) S. D. C. H. Soc. v. Kelley*, 32 S. D. 526, 143 N. W. 953. In a case when, by the request of the mother, a newly born child of unmarried persons had been given to a respectable and responsible man and wife, who thereupon had informally adopted it, the parents of the child intermarried and then demanded the child's return. Suit was instituted over the refusal of the demand. Both parties were fairly

well-to-do in circumstances and means of living. The court awarded the child to the parents.—*Harrison v. Harker*, 44 Utah 541, 142 Pac. 716. On the application of parents to have the custody of a child restored to them, after abandonment proceedings, the applicants are entitled to their day in court and to be allowed to make such a showing for the recovery of their offspring as they may be able to make.—*Guardianship of Michels*, 170 Cal. 339, 149 Pac. 587.

(4) *Abandonment*.—To constitute an abandonment of a minor child within the purview of section 224, Civil Code, it must appear by clear and indubitable evidence that there has been by the parents a giving up or total desertion of the minor and an absolute relinquishment of its custody and control and a laying aside of all care for it by its parents.—*Petition of Kelly*, 25 Cal. App. 651, 658, 145 Pac. 156. Abandonment within the purview of section 224, Civil Code, is a question of intention, and the intention on the part of a parent to abandon a minor child must be shown by a clear, unequivocal, and decisive act of the party—an act done that shows a determination not to have the benefit of the right to which he is entitled.—*Petition of Kelley*, 25 Cal. App. 651, 659, 145 Pac. 156. When a woman dies a few days after giving birth to a child and the father asks his aunt (who is aunt also of the deceased) to take the infant and raise it, he having no home, the aunt can not retain the custody of the child when its father subsequently has a home and desires to resume possession of it; these facts showing no intention on his part to abandon the child.—*Matter of Schwartz*, 171 Cal. 633, 154 Pac. 304. The question as to whether an illegitimate child has been abandoned by its mother is one of fact; and it must be determined, not merely by her objection to an adoption, but by reference to all the facts of the case.—*In re Potter*, 85 Wash. 617, 149 Pac. 23. The mere failure of the parents to contribute to the support and maintenance of a minor child while it is in the care and custody of a third party, for a period of one year, does not itself constitute abandonment within the purview of the statute.—*Petition of Kelly*, 25 Cal. App. 651, 658, 145 Pac. 156.

(5) *Where parents are living apart*.—The superior court of the county in which an application is made by a father, who lives apart from his wife though not divorced from her, to be appointed guardian for one of their minor children, is not without jurisdiction to award the custody of the minor, because of the latter's residence with its mother in another county, where the father resides in the county in which he makes application.—*Cole v. Superior Court*, 28 Cal. App. 1, 151 Pac. 169. The California statute, relating to the appointment of guardians for minor children whose parents live apart, although not divorced, does not require an "action" to be instituted; the prerequisite of the statute is that an "application" shall be made by one of the spouses.—*Cole v. Superior Court*, 28 Cal. App. 1, 151 Pac. 169. Under the California statute, relating to the appointment of guardians for minor children, whose parents live apart, although not divorced, the

petition by a father for letters of guardianship and the answer of the mother filed thereto, praying for a denial of the petition and award of custody to her, is an "application" as that term is used in the statute.—*Cole v. Superior Court*, 28 Cal. App. 1, 151 Pac. 169. If, after a separation between husband and wife, the former goes to where the latter is living and takes away the minor children, notifying her in writing of what he has done and inviting her to return to the family home, she can require no further notice on his petitioning the court to be appointed guardian.—*In re Morehouse*, 176 Cal. 634, 169 Pac. 365.

(6) Appointment of guardian and bond.—Under the preferential parental right declared in section 1751, Code Civ. Proc., the court is bound to appoint as its guardian the mother of a minor under the age of 14 years, whom it has found to be competent, and not shown to be a dissolute or immoral person, and not to have abandoned her child, and the injunction as to the consideration due to the welfare of the child in section 246, Civil Code, must be deemed subordinate to such preferential right.—*In re Matthews*, 174 Cal. 679, 683, 164 Pac. 8. If a suitable and proper person is chosen by a child over fourteen years of age to be his guardian, such person is entitled to the appointment. The court's discretion has reference only to whether the person chosen is proper and suitable.—*Guardianship of Kirkman*, 168 Cal. 688, 144 Pac. 745. A child shown to have an interest in property of his deceased mother, in the hands of the administrator of the latter's estate, can not be said to have no property, so that no necessity for the appointment of a guardian arises.—*Guardianship of Kirkman*, 168 Cal. 688, 144 Pac. 745. Section 1747 of the Code of Civil Procedure does not make notice to the father jurisdictional in proceedings to appoint a guardian for the person and estate of a child.—*In re Morhoff's Guardianship (Cal.)*, 178 Pac. 294. If an infant over sixteen years of age selects as a guardian a person who receives the court's approval, appointment must be made accordingly.—*Estate of McSwain*, 176 Cal. 280, 168 Pac. 117. The right of a guardian to the custody of his infant ward is subject to the same limitations as that of a parent, and the issuance of letters of guardianship on an ex parte application is not such an adjudication of that right as concludes the court from taking such custody away from the guardian in the interest of the ward's welfare.—*People v. Bolton*, 27 Colo. App. 39, 146 Pac. 489. The statute confers upon a guardian no greater right, power or duty over the ward than the parents had, at common law and under the statute, to the custody and control of their offspring.—*People v. Bolton*, 27 Colo. App. 39, 146 Pac. 489. The order of court appointing a guardian, selected by an infant on becoming 14, constitutes an approval of the selection, unless it can be shown that the court abused its discretion.—*Estate of Merklejohn*, 171 Cal. 247, 152 Pac. 734. The father or mother of a child under fourteen years has a preferential right to be appointed guardian, which preferential right the appointing court must recognize and give effect to, unless the parent

is found incompetent, or has knowingly and wilfully abandoned the child, or has failed to support it when able to do so.—*In re Moore's Estate and Guardianship*, 179 Cal. 302, 176 Pac. 461. The right of a parent to his or her child is paramount over that of its cherishing friends or kinsfolk, regardless of the question of the material advantages of the child, unless the parent has abandoned it, or is shown to be an improper person, or to be financially unable to give the child support.—*In re Wise's Estate* (Cal.), 177 Pac. 277. In the selection of a guardian for an infant under 14 years of age preference is to be given to the father or mother, if he or she is competent to discharge the duties. The parents are entitled to the appointment if competent, and the proof of incompetency must be strong to disentitle them.—*Guardianship of Mathews*, 169 Cal. 26, 145 Pac. 503. The commissioner in Alaska can not appoint a guardian for a minor over 14 years of age except in the manner provided in the statute, the requirements therein being that the minor must reside within the district and have failed to nominate a guardian approved by the commissioner, or, having been cited by the commissioner, refused to nominate an acceptable person.—*White v. White Co.*, 4 Alaska 317, 325. The wishes of the deceased mother expressed shortly before her death, naming a relative as the one she wishes to have possession of her minor child, where the father is living, will not authorize the appointment of a stranger as its general guardian, though the child's possession was given to such relative.—*Parker v. Lewis*, 45 Okla. 807, 815, 147 Pac. 310. It is settled law in this state that the father or mother of a minor child under the age of fourteen years has a preferential right to be appointed its guardian, and the court must recognize this right and appoint the parent unless it finds that such parent is incompetent, or has knowingly or wilfully abandoned the child, or, having the ability to do so, has failed to maintain it.—*In re Moore's Estate and Guardianship*, 179 Cal. 302, 176 Pac. 461, 462. An order denying the application of a father of a minor child under fourteen years of age, and appointing the guardian named in the will of his divorced wife, the mother of the child, must be reversed, where the court failed to find that the father was incompetent, and where an assumed finding that he had abandoned and had failed to maintain the child, was unsupported by the evidence.—*In re Moore's Estate and Guardianship*, 179 Cal. 302, 176 Pac. 461, 462. In the absence of a showing that the mother was not a suitable and proper person, her appointment as guardian of the persons and property of her children upon the death of their father, was proper.—*Guardianship of Hogen*, *Studebaker v. Hogen*, 104 Wash. 265, 176 Pac. 339, 340. Where the mother was a suitable and proper person, and there was no showing to the contrary, a determination of the court that it was for the best interests of her minor children that she should be appointed their guardian was correct.—*Guardianship of Hogen*, *Studebaker v. Hogen*, 104 Wash. 265, 267, 176 Pac. 339. Where the father of two minor children left his property in trust



for their benefit until they became of age, and the record discloses no estate belonging to them, the appointment of a guardian of their estate is improper.—Guardianship of Hogen, *Studebaker v. Hogen*, 104 Wash. 265, 267, 176 Pac. 339. Where a parent relinquishes, in favor of his father, his preference right to appointment as guardian of his minor child under 14 years old, the grandfather being in all respects a suitable person, is entitled to be appointed the child's guardian rather than a stranger, however worthy of such appointment in personal character, acting at the instance of the child's maternal grandmother, the mother being dead, not deciding as between such grandmother and the grandfather.—*Parker v. Lewis*, 45 Okla. 807, 813, 147 Pac. 310. It is not error for a trial court, in aid of the presumption that minors were residents of the county at the time of the appointment of their guardian, to admit parol evidence establishing such as an undisputed fact.—*Rice v. Theimer*, 45 Okla. 618, 628, 146 Pac. 702. Under the Alaskan act regulating the appointment of guardians for minors, which act provides, among other things, that the guardian give a bond "in such sum as the commissioner shall order," the guardian must give a bond in some amount, in such sum as may be reasonable in all the circumstances.—*White v. White Co.*, 4 Alaska 317, 323. It is statutory that a guardian for a minor may be appointed on the petition of a relative, or other person in the minor's behalf; it is also statutory that in making the appointment the court must be guided by the child's best interests; without violating either statute the court may, after hearing rival petitions, filed by the mother and grandmother, respectively, of the minor, appoint the father, on the filing of his petition after the submission of the cause.—*In re Dillman*, 16 Ariz. 323, 326, 145 Pac. 143.

#### REFERENCES.

Right of parent to appointment as guardian of minor child.—33 L. R. A. (N. S.) 868.

(7) Jurisdiction of courts.—In Oklahoma the county court alone has jurisdiction of the appointment of guardians of minors.—*Parker v. Lewis*, 45 Okla. 807, 810, 147 Pac. 310. The appointment of a guardian for minors by the county court imports jurisdiction in the court to do so, and it will be inferred from the fact that such an appointment was made, that all the facts necessary to vest the court with jurisdiction to make the appointment had been found to exist before the same was made.—*Hathaway v. Hoffman*, 53 Okla. 72, 153 Pac. 184, 185. Courts of equity possess a continuing jurisdiction over the custody of children and an inherent power to amend, modify or annul orders of custody which in their nature are but temporary, as the welfare of such children under changing conditions may demand.—*Stewart v. Stewart*, 32 Ida. 180, 180 Pac. 165. The superior court, after denying an application by a father for the guardianship of the person and estate of his minor child, under section 1747 of the Code of Civil Procedure of California, providing when and on what petition such appointments

shall be made, may appoint under section 214 of the Civil Code of that state relating to cases where the parents, although not divorced, are living apart, and where the custody of a minor child may be awarded to either spouse, upon his or her application, that court is a court of "competent jurisdiction" to make such order.—*Cole v. Superior Court*, 28 Cal. App. 1, 151 Pac. 169. When a county court has once lawfully acquired jurisdiction of the appointment of a guardian for a minor, its jurisdiction can not be lost except in some prescribed orderly way.—*Crosbie v. Brewer* (Okla.) 158 Pac. 388, 392. The power of the court to appoint a guardian is limited to cases "of minors who have no guardian legally appointed by will or deed." In re Guardianship of Crocheron, *Crocheron v. Babington*, 16 Ida. 441, 453, 33 L. R. A. (N. S.) 868, 101 Pac. 741. A county court of one county has no jurisdiction to appoint a guardian of the person and estate of a minor, who is at the time a resident of another county.—*Leonard v. Childers* (Okla.), 170 Pac. 247.

(8) *Illegitimate children.*—If the father of a child, born out of wedlock, openly acknowledges being such and pay the expenses of the confinement, having previously made the arrangements therefor, it can not be said, after he has married the mother, and demands the child as his, that he makes out no sufficient claim to be the child's father as a matter of law.—*Harrison v. Harker*, 44 Utah 541, 142 Pac. 716. Whether an illegitimate daughter was so recognized by her father as to constitute a general and notorious recognition of her as his child is a question of fact.—*Arndt v. Arndt*, 101 Kan. 497, 167 Pac. 1055.

#### REFERENCES.

Regaining custody of illegitimate child. See subd. 3, *supra*.

(9) *Joint guardianship.*—There is no law whereby a guardian may not be appointed for a minor already under guardianship, since there may be joint guardians with several, as well as joint, authority and liability.—*White v. White Co.*, 4 Alaska 317, 322.

(10) *Collateral attack.*—The appointment of a married woman as guardian of her minor child is not void but voidable only, and the legality of such an appointment can not be collaterally attacked.—*Carolina v. Montgomery* (Okla.), 177 Pac. 612, 613. If an order appointing a guardian recites that an application was made to the county court for the appointment of a guardian, that is sufficient evidence of itself that the proper petition was filed; and such order is valid as against a collateral attack.—*Lowery v. Parton* (Okla.), 165 Pac. 164. An action of ejectment to clear title in which plaintiffs attack the validity of the record and proceedings of the county court in appointing their guardian on the ground that such record and proceedings fail to disclose the residence of the minors at the time of the appointment, is a collateral attack upon the order of appointment, and that the record, being of a court of general jurisdiction as to probate

matters, can not be impeached by evidence aliunde.—*Hathaway v. Hoffman*, 53 Okla. 72, 153 Pac. 184, 185. Where a minor above the age of 14 years nominates his own guardian, it is the duty of the county court to satisfy itself of every fact necessary to vest the court with jurisdiction to make the appointment, and if the court makes the appointment, the presumption is that he heard the evidence and found every fact to justify the appointment, and unless the contrary appears on the face of the record the proceedings of the court can not be collaterally attacked on that ground.—*Baker v. Cureton*, 49 Okla. 15, 150 Pac. 1090, 1092. If an order of the probate court, in appointing a guardian, recites that the ward is a minor, 20 years of age, such recital is conclusive in a collateral attack upon the order.—*Lowery v. Parton* (Okla.), 165 Pac. 164. The appointment of a guardian for a minor by the county court imports general jurisdiction in the court so to do, and, the record thereof being regular upon its face, it will be inferred, from the fact that such appointment was made, that all the facts necessary to vest the court with jurisdiction to make the appointment, including the determination of the proper qualifications of the guardian appointed had been found to exist before such appointment was made.—*Johnson v. Johnson* (Okla.), 159 Pac. 1121.

(11) *Appeal and trial de novo.*—In the exercise of its appellate jurisdiction on an appeal from the order of the county court appointing a guardian of a minor, the district court tries the case *de novo*, but upon the same issues presented in the lower court, and new issues can not be joined, as the appointment of a guardian other than the one appointed by the order appealed from.—*Parker v. Lewis*, 45 Okla. 807, 811, 147 Pac. 310. A petitioner, nominated by a child over fourteen years of age to be guardian of person and estate of such child is, if rejected by the court, a "party aggrieved," and is entitled to appeal from the order by which the appointment was denied him.—*Guardianship of Kirkman*, 168 Cal. 688, 144 Pac. 745. If an infant becomes of age pending a suit involving the validity of a guardian's appointment, the appointing order offers no proper subject of appeal.—*Estate of McSwain*, 176 Cal. 280, 168 Pac. 117. On appeal from the order of the county court appointing the guardian of a minor, the district court acquires appellate jurisdiction only.—*Parker v. Lewis*, 45 Okla. 807, 811, 147 Pac. 310. The father of a minor child having waived his right of appointment as its guardian in the county court can not on appeal to the district court, by an amendment confer upon the latter court jurisdiction to try the issue of an appointment not before the county court.—*Parker v. Lewis*, 45 Okla. 807, 811, 147 Pac. 310. In a proceeding by a former prostitute to recover possession of her illegitimate child, rejected by her when born, on the grounds that she was now reformed and that the present custodians are not worthy persons, both these questions were for the trial judge to consider, he having the witnesses before him; they will not be considered on appeal.—*In re Lew Choy Foon*, 173 Cal. 159, 159 Pac. 440.

### 3. Testamentary guardian.

(1) *In general.*—Guardianship may be effected by the last will of the surviving parent, and the person thereby has the same powers and duties as a natural guardian.—*In re Coun*, 96 Kan. 314, 150 Pac. 516. An appointment by the will of a divorced wife of a guardian of her minor child under the age of fourteen years is ineffectual where the father of such child is alive and competent to act.—*In re Moore's Estate and Guardianship*, 179 Cal. 302, 176 Pac. 461, 462. The Washington statute allowing a father to appoint a guardian of his minor children by last will and testament was repealed by the enactment of a later statute which gave to the mother the complete control of the children and their estate; hence, a provision of a father's will attempting to appoint guardians of the persons and estates of his minor children, made after the enactment of the latter statute, was void at the time it was made.—*Guardianship of Hogen, Studebaker v. Hogen*, 104 Wash. 265, 266, 176 Pac. 339. A woman, having been decreed a divorce from her husband on the ground of desertion, and decreed also the custody of their minor child, can not on dying appoint by will some one other than the husband as guardian.—*In re Moore's Estate and Guardianship*, 179 Cal. 302, 176 Pac. 461.

(2) *Guardian appointed by deed is.*—A guardian appointed by deed must be held to be a testamentary guardian, as such appointment can not take effect until the death of the parent; but, to become such a guardian, he must qualify by giving a bond; it is not enough that he be named in the deed as guardian.—*Murphy v. Superior Court*, 84 Cal. 592, 596, 597, 24 Pac. 310. The right to appoint a guardian of a minor by will or deed is statutory, and under section 241 of the Civil Code, a guardian of a legitimate child may be so appointed "by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent."—*Matter of Allen*, 162 Cal. 625, 124 Pac. 237.

(3) *Mother's incapacity to appoint.*—The common law did not recognize the rights of a testator to appoint a guardian for his children during their minority. While it made various provisions for the care of infants, and their estates, the right to make a testamentary disposition of the guardianship of the children was denied or withheld. It was years after the power to dispose of his property by will had been established by various statutes that the right to make a testamentary disposition of the guardianship of his minor children was conferred. This right was given by the statute of 12 Car., c. 24, and, by the words of that act, the father, only, can appoint the guardian or guardians, who shall have the custody of his children, and the control of their estates, during minority. The power thus conferred, when exercised to its fullest extent, invested the testamentary guardian with an authority over the children, and control of their estates, almost as coextensive as that enjoyed by the father himself. On his appoint-

ment, he supersedes all other guardians, and all control on the part of the mother. So absolute is this power, that it may be exerted in utter disregard of the claims of maternal affection, and despite its protests, and the custody of the children be committed to a stranger, and the life of the mother embittered by depriving her of the society of her offspring. It matters not how amiable and refined she may be, how competent in every respect to direct the education, and to participate, at least, in the custody of her children, the paramount right of the testamentary guardian deprives her of all right to interfere with his custody of them or their education.—*Ingalls v. Campbell*, 18 Or. 461, 24 Pac. 904, 905. This statute, shorn of its verbiage, has been substantially re-enacted in Oregon. The statute did not impose upon nor recognize any civil disability in the wife, nor create any civil disability in her which did not previously exist, but was a new and added right conferred upon the mother, and left her where she was before its enactment. Hence the want of capacity in the wife to make such an appointment is not a civil disability created by statute.—*Ingalls v. Campbell*, 18 Or. 461, 24 Pac. 904, 905. The result, in that state, is, that, while the mother has as full and complete control of the children and their estates at the father's death as the father has at the mother's death, yet the mother has no right to appoint a guardian.—*Ingalls v. Campbell*, 18 Or. 461, 24 Pac. 904, 906. Under section 241 of the Civil Code, a mother is authorized to appoint a testamentary guardian of a minor child only in the event that the father is dead or incapable of acting. This condition must exist at the date of the mother's death, or at least when her will is probated.—*Matter of Allen*, 162 Cal. 625, 124 Pac. 237. A mother to whom a decree of divorce has awarded the custody of a minor child has no right to appoint a testamentary guardian thereof, if the father of the child was alive at the time of her death. Such an attempted appointment is entirely without force or effect, and did not become operative upon the subsequent death of the father.—*Matter of Allen*, 162 Cal. 625, 124 Pac. 237.

(4) *Mother's consent to father's appointment.*—The mother's consent, in writing, to the appointment, by the father, of a guardian for a minor child is required, under section 241 of the Civil Code of California, in all cases, if she is living; but her consent to a testamentary appointment may be effectually given after the father's death, as well as before. The father's appointment is ineffective before his death. There is in fact no appointment at all until the death; and it is only upon his death that her consent becomes of any importance. The appointment, if she survive, is of no effect if she dissents, and she, being the survivor, may withhold her consent, and may appoint whomsoever she chooses, or may herself apply to the court for the appointment of a guardian, under section 1747 of the Code of Civil Procedure of that state. She is then in control of the entire matter, and the appointment of a testamentary guardian, made by the father, before his death, becomes valid and effectual upon the death of the

father and the subsequent written consent of the mother.—Guardianship of Estate of Baker, 153 Cal. 537, 96 Pac. 12.

#### REFERENCES.

Effect of attempt by father to appoint a guardian for his child against the surviving mother.—See note 13 L. R. A. (N. S.) 288-294.

(5) *Welfare of child.*—The primary consideration for the guidance of the court where the appointment of a guardian for a minor is concerned is "the best interest of the child with respect to its temporal and its mental and moral welfare," and the conclusion reached by the court will not be set aside on appeal unless it was reached as the result of an abuse of discretion. In reaching its conclusion the court may take into consideration a preference expressed by the minor, even though the child was under the age of fourteen.—Matter of Allen, 162 Cal. 625, 124 Pac. 237. In appointing a guardian of a minor child under fourteen years of age, the welfare of the child is not the paramount consideration and entitled to prevail over the natural and legal right of the parent, and the latter is entitled to the guardianship, unless he or she is incompetent or has forfeited his or her right by abandonment or failure to maintain.—In re Moore's Estate and Guardianship, 179 Cal. 302, 176 Pac. 461, 462. A guardian, regardless of whether one by testamentary or other appointment, must be approved by the court, having the infant's best interest in mind; and it is only when the person chosen is found, on inquiry, to be fit and proper that the approval is given.—In re McCoun, 96 Kan. 314, 150 Pac. 516.

(6) *Powers of. Validity of acts.*—Under the statute of California, the power to appoint guardians is vested:—1. In the father; 2. In the mother; and 3. In the probate court. But a testamentary guardian has only the powers of the probate guardian, and the powers of a guardian, by whomsoever appointed, are the same, except as modified, in the case of a testamentary guardian, by the will in which he has been appointed. A testator may make such special and lawful directions as he may see proper to give with reference to the education of a minor, his settlement in life, or the management of his estates; but the testamentary guardian can not take the personal custody of the ward so long as there is a mother who is competent, willing, and worthy to have the custody and tuition of her child.—Lord v. Hough, 37 Cal. 657, 669. There is no necessity for the issuance of any letters of guardianship to authorize a testamentary guardian to act. His authority comes directly from the will.—Norris v. Harris, 15 Cal. 226, 256. A guardian appointed by deed is not estopped from questioning the validity of his own appointment on the ground that he never gave a bond, if he has received nothing under the appointment, and has never acted as guardian.—Murphy v. Superior Court, 84 Cal. 592, 24 Pac. 310. Where a testamentary guardian for minor children is named by the last will and testament of a decedent, and there is reasonable

ground to believe that the will is valid and legal, a general guardian of the minors is justified in incurring the expenses necessary in resisting a contest of such will, even though he should fail to establish its validity.—*In re Brady*, 10 Ida. 366, 79 Pac. 75. The acts of a testamentary guardian before letters are issued to him and he qualifies are void.—*Aldrich v. Willis*, 55 Cal. 81, 85.

#### REFERENCES.

Right to appoint testamentary guardian.—See note 2 L. R. A. (N. S.) 203, 204. Appointment of guardian by will, etc.—See *Kerr's Cal. Cyc. Civ. Code*, § 241, and notes.

(1) *Juvenile court law*.—The juvenile court law was enacted for the purpose, among others, of affording a method for the state's assuming control of a child for its welfare in case its parents are unable financially or not proper morally to have charge of it; it is not within its purpose to decide, as between the parents, which one has a right to the child.—*Moch v. Superior Court* (Cal. App.), 179 Pac. 440. One of the purposes of the Juvenile Court Law is to provide the machinery and prescribe the procedure by which the state may assume control of children who, by reason of their financial incapacity or the unfitness of their parents, should be removed from parental custody for their own welfare.—*Moch v. Superior Court* (Cal. App.), 179 Pac. 440, 441. The statutory definition of a "dependent child" is any person under the age of eighteen years who, for any reason, is destitute, homeless, or abandoned.—*Ex parte Bowers*, *Bowers v. Grant*, 78 Or. 390, 153 Pac. 412. The marriage of a female minor takes her out of the class known as "children and minors," under the act providing for the commitment of "dependent" children, and makes her an adult person, so far as such act is concerned.—*Ex parte Lewis*, 3 Cal. App. 738, 86 Pac. 996.

2. *Nature of proceedings*.—A proceeding by which a minor child is committed to the South Dakota Children's Home Society is one substantially in the nature of a guardianship proceeding.—*State (ex rel. South Dakota C. H. Soc.) v. Kelley*, 32 S. D. 526, 143 N. W. 953. A proceeding under section 15, juvenile court act, to declare an abandoned child free from the custody of its parents is a special proceeding neither criminal nor civil in its nature.—*Moch v. Superior Court* (Cal. App.), 179 Pac. 440, 441. Under the act of 1913, relating to juvenile delinquents, the superior court, assuming jurisdiction agreeably to the act, stands in the position of a guardian, and retains its guardianship, for all purposes of the act, no matter to what person or institution it may commit the child to for the reformation, or proper education, and upbringing of such child.—*In re Chartrand*, 103 Wash. 36, 173 Pac. 728. A proceeding in the juvenile court is not a special proceeding within the meaning of subdivision 1, section 963, C. C. P.; the only appeals allowed from decisions of that court are those enumerated in section 23 of the juvenile court law.—*Moch v. Superior Court* (Cal. App.), 179 Pac. 440, 442. A decision in a proceeding under section 15 to declare

an abandoned child free from parental custody, that the proceeding was prematurely brought because the mother was a ward of the juvenile court and deprived of her liberty is not a decision on the merits, in the absence of a finding upon the question of intent to abandon.—*Moch v. Superior Court* (Cal. App.), 179 Pac. 440, 442.

(3) **Abandonment.**—Failure to provide for minor child for one year is only presumptive evidence of abandonment; intent to abandon is the decisive factor under section 15 of the juvenile court law, in a proceeding to declare a child free from parental custody and control.—*Moch v. Superior Court* (Cal. App.), 179 Pac. 440, 441. The fact that the mother was a ward of the juvenile court and deprived of her liberty does not affect the fact that in a proceeding under section 15, juvenile court act to declare her child free from her custody because of abandonment, that the intent to abandon is the decisive factor.—*Moch v. Superior Court* (Cal. App.), 179 Pac. 440, 441. The state has both the duty and the power to guide and guard its helpless young, and therefore may make provision for the custody, care and maintenance of abandoned children and provide a process of law and a forum for the determination of the question whether or not a child is an abandoned child.—*Guardianship of Michels*, 170 Cal. 339, 149 Pac. 587. It is within the state's power to declare what sins, and what acts of omission and commission shall constitute abandonment by the parent or parents.—*Guardianship of Michels*, 170 Cal. 339, 149 Pac. 587. On a determination of abandonment it is within the state's power and duty alike to look out for the child's care and nurture in the future, and proceedings in guardianship and proceedings in adoption may be, and by our law are, based on decrees of abandonment.—*Guardianship of Michels*, 170 Cal. 339, 149 Pac. 587. Due process of law demands that sufficient notice be given the parents when proceedings are to be had on the issue of abandonment.—*Guardianship of Michels*, 170 Cal. 339, 149 Pac. 587. A decree that a child is an abandoned child, given after proceedings duly had, is a final adjudication of the status of the particular child concerned as of the date of the decree.—*Guardianship of Michels*, 170 Cal. 339, 149 Pac. 587. It is not within the reason of the law that a decree of abandonment shall remove a child, permanently and without recall, from the care and influence of its father and mother; the law can not extirpate parental affection.—*Guardianship of Michels*, 170 Cal. 339, 149 Pac. 587.

(4) **Welfare of child.**—The welfare of the child is the main consideration with the court in awarding its custody, but the court must not lose sight of the devotion and care exercised by a mother.—*Buchanan v. Buchanan*, 93 Kan. 613, 144 Pac. 840. The paramount and controlling question in proceedings affecting the custody of an infant is the welfare of the child.—*People (ex rel. Broxholm) v. Parks*, 57 Colo. 458, 141 Pac. 994. In Colorado every child is under the control of the state, and even the paternal right to its custody and control must yield to the interests and welfare of the child; the question as to such interests



and welfare is paramount in guiding the court in proceedings affecting the custody of the infant.—*People v. Bolton*, 27 Colo. App. 39, 146 Pac. 489. The right of a parent to the custody and control of his child is not an absolute and uncontrollable right, like a right in property, and will never be enforced when it is apparent that its enforcement would be against the best interests and happiness of the child.—*People (ex rel. Broxholm) v. Parks*, 57 Colo. 458, 141 Pac. 994. A parent can not be allowed to make his child the subject of a gift, but he may be inferred to have abandoned it, and in such a case the burden is on him to show that it is for its best interests to be returned to him.—*Harrison v. Harker*, 44 Utah 541, 142 Pac. 716. If a mother seeks to obtain the custody of her child merely for the purpose of delivering it to a third person, such claim defeats her natural right to the care and control of it; in such a case, the general rule as to the welfare of the child must control in awarding its custody.—*People (ex rel. Broxholm) v. Parks*, 57 Colo. 458, 462, 141 Pac. 994. The trial court, which has the opportunity of seeing, hearing and observing the parties at close range, is the tribunal to determine whether the welfare of a child, withheld from their custody by another, demands that it be restored to the parents.—*Harrison v. Harker*, 44 Utah 541, 142 Pac. 716.

(5) *Jurisdiction of courts.*—The probate court of Kansas has power to commit to the "State Industrial School for Girls" any girl, under a specified age, who is incorrigible and habitually disregards the commands of her father, mother, or guardian, or leads a vagrant life, or resorts to immoral places or practices, or neglects to perform labor suitable to her years and condition, or to attend school; and this power is not violative of any constitutional right.—*In re Gassaway*, 70 Kan. 695, 79 Pac. 113. The superior court of California has no power to commit to a reform school a person over the age limited by statute at the time of commitment; nor is there any power in an institution to receive such person and retain him or her in custody.—*Ex parte Wood*, 5 Cal. App. 471, 90 Pac. 961. If the statute provides that if a minor under the age of eighteen years is accused of the commission of any crime by a grand jury, they may, in their discretion, instead of finding an indictment against him, return to the superior court that it appears to them that the accused is a fit and suitable person to be committed to the care and guardianship of a designated state institution for the reformation of minors, and that the court may thereupon order such commitment, if satisfied from the evidence that it ought to be made, such minor can not be imprisoned as a criminal without a trial by jury; and the order of commitment of the superior court, in such a case, is void as a judgment of imprisonment, where there was no jury trial, and it is equally void as an award of guardianship, if the parents of the minor were not made parties to the proceeding.—*Ex parte Becknell*, 119 Cal. 496, 51 Pac. 692. As a father can not be deprived of his child without an adjudication by a court of competent jurisdiction that he has abandoned or deserted it, or is unfit to have its custody and

control, and the mother attempts to surrender the child to a charitable institution on a void adjudication that the father has abandoned it, and without notice to or consent of the father, the proceeding is unauthorized.—*State v. Wheeler*, 43 Wash. 183, 86 Pac. 394, 397. The juvenile act of 1909 as amended in 1915, confers jurisdiction upon the juvenile court of all "persons" under the age of twenty-one years, irrespective of the question of their minority.—*In re Willis*, 30 Cal. App. 188, 157 Pac. 819. Under the statute of Wyoming (Comp. Stats. 1910, Sec. 3128) providing that "it shall be lawful for and in the discretion of the district court of any county to commit to" the house of refuge or reform or industrial school of any state, where provision has been or shall be made, "any child being a legal resident of said county, and being between the ages of ten and sixteen years, who upon complaint and due proof, is found to be a vagrant or so incorrigible and vicious that a due regard for the morals and welfare of such child manifestly requires that he or she shall be committed to said house of refuge, or reform or industrial school," the jurisdiction is limited to cases where the child is a legal resident of the county in which the court is sitting. It is a summary proceeding not conducted according to the course of the common law and is not within the general jurisdiction of the district court. In such cases the presumption as to jurisdiction in support of judgments of superior courts of general jurisdiction does not apply and that the court had jurisdiction must therefore appear by the record.—*Kelsey v. Carroll*, 22 Wyo. 85, 138 Pac. 867, 868. The domicile of the parent is generally that of the child, and on the death of a father, who has had the custody of his children, the probate court of his domicile has jurisdiction to appoint a guardian.—*In re McCoun*, 96 Kan. 314, 150 Pac. 516. A court of chancery, always jealous of the rights of wards, will interfere to ratify wrong committed against their persons or property, whether they have been in form plaintiffs or defendants in the proceedings in which the wrong was inflicted.—*Bent v. Maxwell etc. Ry. Co.*, 3 N. M. 158, 3 Pac. 721, 732.

(6) *Procedure*.—In proceedings for the commitment of a female minor, under the act of 1911, relating to juvenile delinquents, the petition must charge that the parents of the minor are unfit or improper guardians for her, or unwilling or unable to care for, protect, train, educate, control, or discipline her; or else it must state that her parent, parents, guardian, or custodian, consent that she shall be taken from them.—*Ex parte Satterthwaite*, 52 Mont. 550, 160 Pac. 346. In a proceeding under the act of 1911, for the commitment of an alleged delinquent juvenile defendant, there must be a citation to the child's custodian.—*Ex parte Satterthwaite*, 52 Mont. 550, 160 Pac. 346. In proceedings for the commitment of a female minor, under the act of 1911, relating to juvenile delinquents, the parent within the jurisdiction of the court, whose residence is known, must be made a party and be notified to appear.—*Ex parte Satterthwaite*, 52 Mont. 550, 160 Pac. 346. A delinquent child can not be taken from its parents

and be put into the state's custody and control, under the juvenile delinquent act of 1911, unless there be an adjudication of court that such parents are unfit or improper guardians, or are unable or unwilling to care for, protect, educate, or discipline the child, and it is for the child's best interest, and that of the people of the state, that the child be taken from the parents' custody.—Ex parte Satterthwaite, 52 Mont. 550, 160 Pac. 346. In proceedings for the committal of a female minor, under the act of 1911, relating to juvenile delinquents, the mother must be made a party defendant where the petition alleges the minor to be in the care, custody, and charge of her parents, and gives the name and residence of the mother of such minor.—Ex parte Satterthwaite, 52 Mont. 550, 160 Pac. 346. In proceedings for the commitment of a female minor, under the act of 1911, relating to female delinquents, either the minor or her parents may demand a trial by jury.—Ex parte Satterthwaite, 52 Mont. 550, 160 Pac. 346. In a proceeding under the act of 1911, for the trial of an alleged delinquent juvenile defendant, the right of trial by jury can be waived only in the manner provided by law.—Ex parte Satterthwaite, 52 Mont. 550, 160 Pac. 346.

(7) Award of custody in divorce proceedings.—Divorces are not granted for offenses against children, and the bestowal of the custody of a minor in a divorce suit is not, unless otherwise provided by statute, an adjudication of the fitness of the parent who is for the time denied the right to retain possession of the child.—Bell v. Krauss, 169 Cal. 387, 146 Pac. 874. Where, in a divorce proceeding one of the parties is awarded the custody of a child of the marriage, this does not, in the absence of a finding that the other party is an unfit person to have possession and control of the child, amount to an adjudication as to such other party's fitness.—Bell v. Krauss, 169 Cal. 387, 146 Pac. 874. In decreeing a divorce when there are children of the marriage, of tender years, the mother rather than the father should be given their custody when both are morally fitted to undertake the care; but the father should be preferred when it appears that the mother's conduct has brought reproach upon her.—Smith v. Frates (Wash.), 180 Pac. 880. Upon the death of a mother, to whom a child has been given by a decree of divorce, the father becomes entitled to the custody of the child.—Bell v. Krauss, 169 Cal. 387, 146 Pac. 874. The code, in providing for the protection of the children of the parties to a divorce suit, does not contemplate the creation of a fund for the maintenance of said children after their reaching majority, but only for their support and education up to that time.—Emery v. Emery, 104 Kan. 679, 180 Pac. 451.

(8) Guardianship and adoption.—The person and estate of a minor are, ordinarily, independent in a guardianship matter, and the court may appoint a guardian for either the person or estate, or for both; but in the case of an incompetent person, the necessity for a guardian of the person is equally as great as the necessity for a guardian of the estate.—State (ex rel. Carroll) v. District Court, 50 Mont. 428, 147 Pac.

612. The probate courts have jurisdiction in guardianship matters; for this purpose they are courts of general jurisdiction; and, if a benevolent or charitable society is made the guardian of a child by order of the probate court, that court has full control of such society as guardian and may terminate the guardianship when it is no longer necessary; but a reasonable notice should be given.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. A society has no authority over a child, never legally surrendered to it nor placed in its custody; under such circumstances it can not legally act as the child's guardian nor consent to its adoption.—*Application of Martin*, 29 Ida. 716, 161 Pac. 573. When a guardianship is terminated by the probate court, a reasonable notice should be given although notice is not required by the statute; but an informal notice of that fact, brought home to the representative of the guardian, who is apprised of such termination and of the reasons therefor, is sufficient to bind the guardian.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. Proceedings to commit juvenile delinquents are in the nature of proceedings providing for guardianship.—*In re Brodie*, 33 Cal. App. 751, 166 Pac. 605. In any case where the court commits a child to the care of any individual, according to the provisions of the juvenile law, the child shall, unless otherwise ordered, become a ward and be subject to the guardianship of such individual.—*Ex parte Bowers*, *Bowers v. Grant*, 78 Or. 390, 153 Pac. 412. Although the juvenile department of the superior court is not the same as the department in which adoption proceedings are considered, but both are branches of the same court, and the knowledge of the judge of the latter department must be construed as notice to the former that an adoption proceeding is pending, and no other notice of such proceeding is required.—*In re Rising*, 104 Wash. 581, 177 Pac. 351, 353.

#### REFERENCES.

Adoption of children. See note ante, on Law of Adoption.

(9) Habeas corpus if jurisdiction is lacking.—Where a petition, praying that a minor be taken into custody as a dependent child, fails to state any of the facts required by statute to constitute the child a dependent, an order of the juvenile court committing him to the custody of the probation officer is without jurisdiction and the child will be released on habeas corpus.—*Ex parte Burner*, 23 Cal. App. 637, 138 Pac. 90. A juvenile delinquent, who has been committed to an institution for delinquent children, but not in conformity with the requirements of the statute, will be discharged on habeas corpus.—*Ex parte Satterthwaite*, 52 Mont. 550, 160 Pac. 346.

#### 5. Habeas corpus for custody of children.

(1) Habeas corpus as a remedy.—The writ of habeas may issue to determine the proper custody of a minor child.—*Application of Martin*, 29 Ida. 716, 161 Pac. 573. Where a woman is aggrieved by the taking of her minor child, and the commitment of the child to the industrial training school, a remedy for her is habeas corpus.—*Allen v. Williams*,

31 Ida. 309, 171 Pac. 493. The use of the writ of habeas corpus to determine the right of the custody of infants, as available at common law, is equitable in nature, and it is still available in courts of equity; from the fact that the legislature has provided a mode of procedure for it in the cases for which it was originally designed, but is silent as to the procedure in equity cases, it follows that the statutory proceedings are still available in equity cases.—Ex parte Turner, *Turner v. Hendryx*, 86 Or. 590, 167 Pac. 1019, 169 Pac. 109. The petition of a father for a writ of habeas corpus to obtain the custody of his seven-year-old daughter from her aunt was denied, where his fitness to have such custody had previously been made more than once the subject of judicial inquiry, and the court had determined that he was not the proper person to possess and control the child; in this case, the child appeared to have great love for her aunt and a distinct aversion to the petitioner, and it was held that the question of the child's custody should have been settled in a guardianship proceeding or in application for adoption.—Ex parte Britt, 176 Cal. 177, 167 Pac. 863.

(2) *Nature of proceeding.*—A proceeding by habeas corpus for the purpose of obtaining the custody of a child is, not to set the child free, but to determine whether the petitioner is entitled to its custody; and the correct view or ruling is, that the jurisdiction of the question of the custody of a child under a writ of habeas corpus is of an equitable nature, and courts are given large discretion in the matter. In cases of this character, where the controversy arises over the custody of a child, the real issue is one between private parties contesting a question of private right, under the form of habeas corpus proceedings, in which there arises no question of personal liberty. In such cases the question of personal freedom is not involved, as an infant, for humane and obvious reasons, is presumed to be in the custody of some one until it has obtained its majority. Such cases are not decided upon the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in the custody of one person or another. In such cases the question of personal freedom is not involved, except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint.—*Tytler v. Tytler*, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 1, 2; *In re Hamilton*, 66 Kan. 754, 71 Pac. 817; *Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787. A proceeding by habeas corpus instituted by a father to obtain custody of his infant child, is a proceeding in equity.—Ex parte Turner, *Turner v. Hendryx*, 86 Or. 590, 594, 169 Pac. 109. The act of a juvenile court, in awarding the custody of a dependent minor too young to select a guardian, is not a judgment in a criminal action; and the keeping of the minor by the person to whom the award is made is not a restraint of liberty.—Ex parte Bowers, *Bowers v. Grant*, 78 Or. 390, 153 Pac. 412. Habeas corpus is not a special proceeding of a criminal nature; it has been regarded as such mainly because of

the place in the Penal Code assigned to the subject-matter; no implication or presumption of legislative construction is to be drawn from the classification of the codes.—*State (ex rel. Brandegee) v. Clements*, 52 Mont. 57, 155 Pac. 271. A proceeding by habeas corpus to obtain the custody of an infant is civil in its nature, not criminal; and a former adjudication on the question of the right to such custody may be pleaded as *res judicata*; such adjudication is conclusive upon the same parties, upon the same state of facts.—*Ex parte Holt*, 34 Cal. App. 290, 167 Pac. 184.

(3) *Return to writ*.—The supreme court has authority to make a writ of habeas corpus returnable before any district court.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. In habeas corpus proceedings instituted by a woman to inquire into the cause of the restraint of the person of her minor daughter, committed to the industrial training school, the district court has power to require the defendant to make proper return to the writ setting forth, not only the authority under which he has the custody of the child, but also the reasons, if any there be, why the plaintiff is not a suitable person to have the guardianship and custody of her daughter.—*Allen v. Williams*, 31 Ida. 309, 171 Pac. 493. If, after a divorce between parents, the father of a child is awarded its custody, but the mother retains its custody and falls to comply with the order of the court, she can not, when the father years afterward sues out a writ of habeas corpus for the custody of the child, rely upon her petition for a modification of the decree, as a defense to the writ, answering that she is now a fit and proper person to have care of the child.—*Beers v. Walker*, *Beers v. Beers*, 101 Wash. 683, 685, 172 Pac. 861.

(4) *Jurisdiction of courts. Temporary order*.—The jurisdiction of the question of the custody of a child, under a writ of habeas corpus, is of an equitable nature, and courts have large discretion in the matter.—*Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787. In Kansas the probate courts have jurisdiction in habeas corpus cases.—*In re Gassaway*, 70 Kan. 695, 79 Pac. 113; but in Idaho and Wyoming, jurisdiction of the care and custody of infant children is committed to the district courts and the judges thereof.—*In re Miller*, 4 Ida. 711, 43 Pac. 870; *Tytler v. Tytler*, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 1, 2. In Idaho, the district judge at chambers has all the powers of a court in habeas corpus proceedings, and the judge may issue an order for the temporary care and custody of a person alleged to be illegally restrained of his liberty, to continue until the hearing of the determination of the writ of habeas corpus. Such order need not be issued by the clerk, under the seal of the court; the signature of the judge is sufficient. The statutes in that state, in regard to the writ of habeas corpus, must be liberally construed, with a view to effect their object and to promote justice.—*In re Dolling*, 4 Ida. 715, 43 Pac. 871. Where a husband who had separated from his wife obtained possession of their child without her consent and took it into another state the trial

court, both parties being within its jurisdiction, has authority under a writ of habeas corpus to compel the return of the child, and its production in court.—*Breene v. Breene*, 51 Colo. 342, 117 Pac. 1002. Where any child under eighteen years of age shall be found to be dependent or neglected, the court may make an order committing him, or her, to the care of some reputable citizen of good moral character, and the court may afterward set aside or modify such order.—*Ex parte Bowers*, *Bowers v. Grant*, 78 Or. 390, 153 Pac. 412. Under the statute of Washington, the custody of a child, committed as a dependent child by the juvenile court, may be changed pending the hearing of an application for a writ of habeas corpus to obtain such child; the application for the writ may, of itself, be treated as an application for a change of custody, and the judge to whom application is made, having the welfare of the child in mind, may change the custody, pending the hearing of the application.—*State (ex rel. De Bit) v. Mackintosh*, 98 Wash. 438, 441, 167 Pac. 1090. A girl under eighteen years of age is within the purview of the "Juvenile Court Law," and within the jurisdiction of the juvenile court, although she has been married to a person of full age and the marriage has been annulled.—*In re Lundy*, 82 Wash. 148, Ann. Cas. 1916E, 1007, 143 Pac. 885. Courts of equity possess a continuing jurisdiction over the custody of children and an inherent power to amend, modify, or annul orders of custody which, in their nature, are but temporary, as the welfare of such children, under changing conditions, may demand.—*Stewart v. Stewart*, 32 Ida. 180, 180 Pac. 165.

(5) What matters, only, will be considered.—In a habeas corpus proceeding for the custody of a child, the court will, where it is possible, keep the family or the remaining members of it together, if possible, especially where there is one willing to keep the family together not only because they are the children of one of his relatives, but also because it was the wish of their dead father.—*Jones v. Bowman*, 13 Wyo. 79, 67 L. R. A. 860, 77 Pac. 439, 442. The proceeding in such cases is confined within very narrow limitations, and can not be extended to the adjudication of claims and money demands and unsettled accounts between the parties. The only jurisdiction of the court is to determine who has the better right to the custody of the child, and to decree it to such custody. It is only those matters which have a necessary connection with the question of the validity of the detention that will be considered, and all other matters will be uniformly rejected.—*Foulke v. People*, 4 Colo. App. 519, 36 Pac. 640. A court, on a habeas corpus proceeding for the custody of an infant, will not give the slightest weight to the religious belief of the parties, especially where the statute of the state not only fails to make any distinction as to religious beliefs, but absolutely prohibits any distinction being made on account thereof.—*Jones v. Bowman*, 13 Wyo. 79, 67 L. R. A. 860, 77 Pac. 439. Where parents, because of certain faults, have been deprived in judicial proceedings of the custody of their

children, but afterward seek to regain the custody on the ground that such faults have been corrected, the only evidence material in the case is that as to the conduct of the parents after the children were taken from them; evidence as to their conduct before that time is immaterial and is properly excluded.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364.

#### 6. Welfare of infant controls.

(1) **Cardinal principle.**—The cardinal principle upon a habeas corpus proceeding is the welfare of the child, and to regard the benefit of the infant; to make the welfare of the child paramount to the claims of either parent. The court will not regard the parental right as controlling, when to do so would imperil the personal safety, morals, health, or happiness of the child. In determining this delicate and often difficult question, the court looks to the character, condition, habits, and other surroundings of claimants.—*McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 410; *Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787, 789; *Jones v. Bowman*, 13 Wyo. 79, 67 L. R. A. 860, 77 Pac. 439; *Tytler v. Tytler*, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 1, 2. In habeas corpus proceedings involving the custody of an infant, the paramount and controlling question by which the court must be guided is the interest and welfare of the child.—*People (ex rel. Broxholm) v. Parks*, 57 Colo. 458, 141 Pac. 994. The courts are influenced, in awarding the custody of a child to either one of its parents in preference to the other, wholly by the consideration of the child's best interest.—*Linch v. Harden (Wyo.)*, 176 Pac. 156. In determining the custody of a child, the paramount consideration is the child's welfare.—*Larson v. Dutton (N. D.)*, 172 N. W. 869. In controversies affecting the custody of an infant, the interest and welfare of the child is the primary and controlling question by which the court must be guided.—*Wilson v. Mitchell*, 48 Colo. 454, 30 L. R. A. (N. S.) 507, 111 Pac. 21, 25. On habeas corpus to recover the custody of a child, in this case a male Indian child of Alaska, the best interests of the child is the question of controlling consideration.—*In re Can-ah-Conqua (Alaska)*, 29 Fed. 687. In the matter of the award of the custody of the person and property of a minor, the rule sanctioned by courts in general is that the minor's welfare is the controlling consideration; but this rule yields to a statute that makes a parent's right paramount, providing the parent applying is unobjectionable morally.—*In re Wise's Estate*, — Cal. —, 177 Pac. 277.

#### REFERENCES.

Denial of custody of child to parent for its well being. See note 41 L. R. A. (N. S.) 564.

(2) **Matters to be considered.**—In determining the right to the custody of a child as between one parent and a third person who has adopted it with the consent of the other parent, which adoption has been approved by the court in a divorce decree subsequently rendered, the wishes of the parent will be subordinate to the moral, intellectual,



and material welfare of the child. It is not sufficient to establish the unfitness of a parent for the custody and control of his minor child, to show that he has some faults of character or bad habits; it must be shown that his condition in life or his character and habits are such that provision for the child's ordinary comfort and contentment, or for its intellectual and moral development, can not be reasonably expected at the parent's hands.—*Jamison v. Gilbert*, 38 Okla. 751, 47 L. R. A. (N. S.) 1133, 135 Pac. 342. In cases where husband and wife are permanently separated, and the custody of their minor child has been judicially awarded to one of them, changing circumstances may make it to the child's interest that the custody be transferred to the other; in such cases *res judicata* does not prevail, and neither does the "full faith and credit" clause of the constitution.—*Lynch v. Harden* (Wyo.), 176 Pac. 156. If the mother of a four-year-old daughter is dead, the father is entitled to the custody of the child, if he is a suitable person to have it and is in a situation to care for the child; but, where he has no home of his own and merely proposes to take his child from her mother's parents and to place her elsewhere, the welfare of the child is to be considered; and, if she has a good home where she is and is well cared for, there is no error in denying the father's application for a writ of habeas corpus and leaving the child with the defendants.—*Harris v. Muir*, 24 Wyo. 213, 216, 157 Pac. 26. In determining to whom the custody of a child should be awarded its welfare is to be regarded more than the technical legal right of the parent; but where an application made by a father for the custody of his child after the death of its mother is resisted by a third person on the ground that the father is immoral and unfit to have its custody he will not be deprived of such custody unless the objection is sustained by clear and satisfactory proof.—*Pinney v. Sulzen*, 91 Kan. 407, Ann. Cas. 1915C, 649, 137 Pac. 987. If a child is delicate, undersized and in need of special attention as to diet, and is living with an aunt who provides for it, and is able and willing to continue so to provide, a comfortable home with healthful and moral surroundings, and where it is given strong affection and constant and loving care, the court should ponder over these considerations as having greater weight than the one that the religious training would perhaps be more thorough in an orphanage.—*People v. Bolton*, 27 Colo. App. 39, 146 Pac. 489. The principle of the law, in relation to the awarding of the custody and tuition of an infant, is that the wishes of the parent in regard to its religious training shall be respected, but this principle must give way to the consideration of the infant's welfare.—*People v. Bolton*, 27 Colo. App. 39, 146 Pac. 489.

(3) **Legal presumption.**—The legal presumption is that it is for the best interests of the child and of society for the child to remain with its natural parents during the period of its minority and be maintained, cared for, and educated by them under their supervision and direction; though there is no absolute right in the parents in this regard.—*Hum-*

mel v. Parrish, 43 Utah 373, 134 Pac. 898, 901. In a habeas corpus proceeding by parents for the custody of their child, held by respectable persons wishing to adopt it the court is to be controlled by what appears to be the best interests and welfare of the child, rather than by the naked legal right of those claiming it; the legal presumption is that being in the care and custody of the parents will most conduce to this welfare and interest.—Harrison v. Harker, 44 Utah 541, 142 Pac. 716.

(4) *Right of parent to yield, when.*—The paramount right of the parent must, however, in all cases be held subordinate to the welfare of the child.—State v. Bell, 58 Wash. 575, 109 Pac. 51. In determining the custody of a child, his welfare is the paramount consideration. Even parental love must yield to the claims of another, if, after due judicial investigation, it is found that the highest good of the child requires it.—In re Hickey (Hickey v. Thayer), 85 Kan. 556, 41 L. R. A. (N. S.) 564, 118 Pac. 56. When a parent has surrendered the control of his child when it was a toddling infant to other parties and permitted them to maintain, clothe, feed, and care for it until it is eight or nine years of age and a strong reciprocal mutual affection has grown up between the child and its foster parents, and the parent seeks to recover possession of the child, the natural or presumptive right of the parent can not prevail if the interest and welfare of the child forbid it. The law in such cases regards the welfare and permanent interests of the child as much more important than the natural or presumptive right of the parent.—Hummel v. Parrish, 43 Utah 373, 134 Pac. 898, 901. A parent may by contract legally transfer and surrender his infant child into the custody of another where the interest of the child is not prejudiced by the transaction, and in all controversies arising respecting the custody of the child after such transfer and surrender have been made, the paramount consideration—the question of controlling importance—is the interest, welfare, and happiness of the child.—Stanford v. Gray, 42 Utah 228, Ann. Cas. 1916A, 989, 129 Pac. 423, 426.

(5) *Discretion of court.*—The court in determining, on habeas corpus, the custody of a minor child, will, in the exercise of its discretion, look to and be governed by the welfare of the child; that is the matter of paramount importance.—Walker v. Edwards, 32 Ida. 257, 181 Pac. 932. The practice of consulting the infant's wish is well established in such cases, not that it should control in that matter, but that the court may more wisely exercise its discretion, and may learn its feelings, its attachments, its probable welfare and contentment.—Andrino v. Yates, 12 Ida. 618, 87 Pac. 787, 789. In some of the earlier cases in this country, the courts were inclined to follow the common-law doctrine that the father had an absolute right to his children, superior to that of the mother and all others; but, on habeas corpus proceedings to determine the rightful and lawful custody, even in states which once followed the common-law rule, and whether the contention is between the father and mother for possession, or between the father and strangers, the question is now determined upon the more humane ground, generally

recognized, that the welfare and interest of the child in controversy is the paramount question under consideration.—*McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406, 409. In contests between parents and third persons as to the custody by such parents, the opinion is now universal, that neither of the parties has any right that can be allowed to militate against the welfare of the infant. The real question in a case like this is, not what is the right of the father or other relatives to the custody of the child, nor whether the right of the one is superior to that of the other, but what are the rights of the child. When, therefore, a court is asked to lend its aid to put the infant into the custody of the father, and withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant. It is an entire mistake to suppose that the court, at all events, is bound to deliver over the infant to its father, or that the latter has an absolute vested right to its custody.—*McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406, 409, 410.

#### 7. Awarding child to proper custody.

(1) Right to custody.—A person who is a suitable person for the purpose is entitled to the custody of a child as a matter of right, as against any one not its parent, irrespective of the question whether it might be better provided for by some one else who is willing to assume the obligation.—*Hollinger v. Eldridge*, Ex parte *Hollinger*, 90 Kan. 77, 132 Pac. 1181.

(2) Parents' right in general.—The right to the custody of minor children is a joint one, to be enjoyed by their parents so long as the latter live together and exercise the right; but the right of the father as to the custody of his minor child being limited, he has no legal, arbitrary right to keep such child away from its mother, if the separation from her endangers its health, and especially if it is of such an age as to require a mother's care. Upon the separation of the parents, the joint right of custody is severed; it must then go to one or the other. If the parents can not agree as to which shall have such custody, and resort to the courts to determine that question, it is clear that the court will regard the welfare of the child as the paramount consideration.—*Tytler v. Tytler*, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 1, 2; and the petitioner must abide the law of the place where the question is litigated, regardless of the law of the domicile.—*Tytler v. Tytler*, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 1, 2. So where a child has been unlawfully committed to a reform school, it will be discharged, on habeas corpus, from the custody of the superintendent of the school and restored to the custody of its parents.—Ex parte *Becknell*, 119 Cal. 496, 51 Pac. 692. Where the legal right of the parent is not clear, the best interests of the child will govern the decision of the court. The legal right, however, to the custody of a minor may be abandoned or forfeited by the acts or conduct of the parent, and in such a case he is equitably estopped from asserting such legal right.—

*Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787. In a contest for the custody of an infant, by a proceeding in habeas corpus, between the father and the immediate family of the deceased mother, the custody of the child will be awarded to such family, if the moral and financial qualifications of both parties are equal, but it appears that the child had never known its father, that the only member of the father's household was his mother, about eighty years of age, and that whatever the child knew of home and its surroundings was learned from and connected with said family of the deceased mother.—*McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406, 410. Courts will not disturb the family relation, nor take a child from its parent merely because a third person, seeking its custody, may have large means and is therefore able to give the child greater comforts, wider education, and the promise of a larger inheritance.—*Pinney v. Sulzen*, 91 Kan. 407, Ann. Cas. 1915C, 649, 137 Pac. 987. The unfitness which will deprive a parent of the right to the custody of his minor child must be positive and not comparative; and the mere fact that his minor child might be better cared for by a third person is not sufficient to deprive the parent of his right to its custody.—*Jamison v. Gilbert*, 38 Okla. 751, 47 L. R. A. (N. S.) 1133, 135 Pac. 342. Upon the death of a parent to whom upon the granting of a divorce, the custody of a child has been awarded, the right to its custody accrues to the other parent, if a suitable person for that purpose.—*Hollinger v. Eldredge*, Ex parte Hollinger, 90 Kan. 77, 132 Pac. 1181. Where a parent in writing voluntarily relinquishes and surrenders the custody of his infant child to the custody of another, he can not recover the custody of the child in his own right; and where he comes before the court for that purpose the burden is upon him to show, not on his own behalf, but on behalf of the child, that it is not being properly cared for.—*Stanford v. Gray*, 42 Utah 228, Ann. Cas. 1916A, 989, 129 Pac. 423, 428. By natural law, by common law, and likewise by the statutes of the state of Colorado, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be intrusted with their care, control, and education, or when some exceptional circumstances appear which render such custody inimical to the best interests of the child.—*Wilson v. Mitchell*, 48 Colo. 454, 30 L. R. A. (N. S.) 507, 111 Pac. 21, 26. In a contention for the custody of a child between parents, who have failed to manifest uniformly a parental regard for it, and persons who have adopted it, care for it lovingly, and have the child's entire affection, and who are, moreover, in prosperous circumstances, the award should be regardless of the rights of natural parents, to the adopting parties, as being one for the child's best interests.—*In re Sidle*, 31 N. D. 405, 410, 154 N. W. 277. Where a child has been brought up by foster parents in an environment that is distinctly different from that to which he would be submitted by restoring him to the care of his mother a revulsion of feeling would be liable to occur which would lead to embarrassment and misery and under the circumstances of the case the foster parents are entitled to

retain the custody of the child.—*Ex parte Fields*, 56 Wash. 259, 105 Pac. 469.

(3) *Father's right to custody.*—The right of a father with respect to his minor child is not an absolute, paramount, proprietary right or interest in or to the custody of the infant, but is in the nature of a trust reposed in him. Where the parents are living apart, and the mother has made an unauthorized attempt to surrender her child to a charitable institution, without notice to or consent of the father, the court will, on habeas corpus, award the custody of the child to the father, it appearing that he is a proper person to have it.—*State v. Wheeler*, 43 Wash. 183, 86 Pac. 394, 398. The parents are the natural guardians, and *prima facie* are entitled to the custody, of their minor children. A verbal agreement by the father, committing his child to the care and custody of another until it shall have attained its majority, is void, and such child will be restored to its father upon a writ of habeas corpus. The authorities almost universally agree that a parol agreement by the father, placing his child in the custody of another, is revocable at any time by the father, and that, upon a habeas corpus proceeding, the child will be delivered to the father, unless considerations of the welfare of the child control.—*Foulke v. People*, 4 Colo. App. 519, 36 Pac. 640, 643. The father has a natural right to the custody of his infant child, and the same should be awarded to him in all cases unless, by reason of his character, associates, or manner of life, such custody would not be for the child's welfare.—*Ex parte Turner*, *Turner v. Hendryx*, 86 Or. 590, 167 Pac. 1019, 169 Pac. 109. A motion by the father of an infant to set aside an order previously made appointing the child's aunt to be guardian of her person and estate, the ground being the lack of necessity for such an appointment, should be overruled on the production of a letter, written by the father immediately before the guardianship proceedings, consenting to the same.—*In re Morhoff's Guardianship* (Cal.), 178 Pac. 294. The fact that a husband, on his wife's securing a divorce from him, acquiesces in her wish to have full control of their child, and to support it, does not negative his preferred right of guardianship on the wife's dying.—*In re Moore's Estate and Guardianship*, 179 Cal. 302, 176 Pac. 461. Evidence that a father agreed that his sister-in-law should have his infant child, even if undisputed, would not justify the refusal upon habeas corpus to award its custody to him; since the father has a right to revoke such an agreement, since a child is not a chattel, subject to sale or cold-blooded bargaining.—*Ex parte Turner*, *Turner v. Hendryx*, 86 Or. 590, 594, 169 Pac. 109. In the absence of anything in the evidence showing that the father was in any way unworthy or that he had abandoned his child, it was error to ignore his natural rights and award the custody of his infant child on habeas corpus to another.—*Ex parte Turner*, *Turner v. Hendryx*, 86 Or. 590, 594, 169 Pac. 109. If the father of an infant agrees informally to its being given to its dead mother's sister to be reared, the agreement may subsequently

be revoked by him, and the child be awarded to him on a writ of habeas corpus, where he is not unworthy nor unfit to have its custody.—*Ex parte Turner*, *Turner v. Hendryx*, 86 Or. 590, 167 Pac. 1019, 169 Pac. 109. After the death of the mother, to whom the custody of the child had been given by a decree of divorce, the father being a suitable person is the proper person to have the custody of the child as against the mother's parents.—*Ex parte Barnes*, 54 Or. 548, 21 Ann. Cas. 465, 25 L. R. A. (N. S.) 172, 104 Pac. 296, 297. The fact that the father required the children to assist in the ordinary work in and about the home, and the fact that the stepmother is strict in disciplining the children, do not offer sufficient reasons for awarding the custody of the boy to the grandmother.—*State v. Bell*, 58 Wash. 575, 109 Pac. 52. The right of a father to the custody and services of his child is subject to the welfare of the child and in furtherance thereof the court may give the child into the custody of the mother in preference to that of the father.—*Breene v. Breene*, 51 Colo. 342, 117 Pac. 1002. The husband, whose wife undertook the care of an infant child for an uncertain compensation, and who cared for and supported it for two or three years, has no legal right to the custody of such child against the claims of its mother, and the mother having obtained its custody, can not be deprived thereof by writ of habeas corpus.—*In re Butler*, 41 Okla. 629, 137 Pac. 673. The court may, on habeas corpus to secure the custody of a child, where the conditions are peculiar, regard the interests of the child as a superior consideration to the right of a father, and award the custody to a person not a parent.—*Application of Bell*, 28 Cal. App. 547, 153 Pac. 240.

(4) *Mother's right to custody.*—On habeas corpus by a mother for custody of a child, respondents can not rely on pending proceedings under Rem. & Bal. Code, Sec. 1701, to adjudge custody of the child as one abandoned, where no process has been served in that proceeding, no date for final hearing fixed, and no final order made; the society to which custody was temporarily awarded in such proceeding acquiring no rights available as a defense to the habeas corpus proceedings.—*State v. Reynolds*, 60 Wash. 12, 110 Pac. 634. The legal right of the mother of a minor child, its father being dead, to its custody and control, is superior to that of a third person whose claim is based upon the fact that he has cared for and supported the child for some two or three years.—*In re Butler*, 41 Okla. 629, 137 Pac. 673. The fact that a child's affections cling to a stranger, who is fond of him and disposed to do for him more than his mother can do, will not justify a court in denying the mother's application to have the custody of him; unless she has abandoned him or in some other way, specified in the code, forfeited her right.—*Ex parte Mathews*, 176 Cal. 156, 167 Pac. 873. Circumstances under which the right of the foster mother of an illegitimate child is paramount to that of its own mother.—*In re Potter*, 85 Wash. 617, 149 Pac. 23.

(5) *Change of custody.*—Where a number of white children of tender years were sent to Arizona by the New York Foundling Hospital, and such children were given to some impecunious, illiterate, and vicious half-breed Mexican Indians, but were afterwards taken from them by American residents of the locality, who cared for the same, and provided them with suitable homes, and the hospital filed its petition for a writ of habeas corpus to procure the custody of the children, the court held that neither the petitioner nor the respondents had any such legal claim as authorized it, for that reason, to award to either of the parties the care and custody of the children, but, in considering what was best to subserve the best welfare of the children, the court decided that it would be for their best interests that no change be made in their custody; and that they be left in the “changing West, the land of opportunity and hope,” to grow to manhood and to womanhood, and where they would have the fullest opportunity possible for them to be judged, not upon the unfortunate condition of birth, but upon the record they themselves might make, and the character they should develop.—*New York Foundling Hospital v. Gatti*, 9 Ariz. 105, 7 L. R. A. (N. S.) 306, 79 Pac. 231, 233, 238.

(6) *Attacking adoption proceedings.*—Where a child has a mother living, and it has been adopted by another, without notice to the mother, the adoption proceedings are void, and the mother, on habeas corpus, is entitled to the custody of her child, where she is shown to be capable, worthy, and affectionate, and has done nothing to impair her right, though respondents have better financial resources. This should not be allowed to turn the scale. “Children born in mangers and humble log cabins have been known to do well.”—*In re Carter*, *Carter v. Botts*, 77 Kan. 765, 93 Pac. 584. Where an order of adoption is collaterally attacked on a writ of habeas corpus, the judgment as to the validity of the adoption is conclusive, in a subsequent proceeding to vacate the order of adoption, though no objection was made in the habeas corpus proceeding that the attack was collateral.—*In re Clifford's Estate*, 37 Wash. 460, 107 Am. St. Rep. 819, 79 Pac. 1001, 1002.

(7) *Attacking guardianship proceedings.*—The right to the guardianship of a minor can not be tried upon habeas corpus.—*Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787. Upon the appointment of a guardian for the person of a minor, the authority of the parent ceases, and the guardian, if duly appointed, is legally entitled to the custody of the minor; and this right of the guardian to the custody of the minor can be attacked collaterally only upon the ground of want of jurisdiction in the court to make the order of appointment; and when, upon proceedings in habeas corpus, the respondent justifies his custody of the minor by such an order, an impeachment thereof is a collateral attack.—*In re Lundberg*, 143 Cal. 402, 403, 77 Pac. 156. If the respondent is the duly appointed guardian of a person of a Chinese girl, his right to her custody, irrespective of the question of parentage, can not be denied on habeas corpus, not only because as guardian of her person he is her

legal custodian, but because his appointment involved a determination by a competent tribunal as to who was her father.—*In re Chin Mee Ho*, 140 Cal. 263, 266, 73 Pac. 1002. The appointment of a guardian is in the nature of a judgment, from which an appeal may be taken; and, unless it is taken within the prescribed statutory time after the order of appointment is rendered, it becomes final, and can not be collaterally attacked by the parents on habeas corpus.—*Ex parte Miller*, 109 Cal. 643, 647, 42 Pac. 428. An appointment of a guardian of the person of a minor, made without actual notice to the parent, but in all other respects in accordance with all statutory requirements, is not void, and is not open to collateral attack on habeas corpus.—*In re Lundberg*, 143 Cal. 402, 77 Pac. 156, 160. In a great majority of cases the minor is in the care of its parents, and in such cases notice to them is therefore essential. But where the child is in the care of some other person, notice to that person will ordinarily reach the parents at once, in the absence of fraud, if the parents have not practically abandoned the child and ceased to make inquiry in regard thereto. The court to which an application for an order for the appointment is made will always make inquiry as to the relatives, and require notice to be given to them, where the giving of such notice is practicable. If it subsequently develops that a parent has, by such proceedings, been deprived of the custody of his minor child, the order may be annulled or vacated by appropriate proceedings; and the court having jurisdiction of a guardianship proceeding will always, on seasonable application by a parent who did not in fact have notice, liberally exercise the discretionary power confided to it, to give the parent full opportunity to be heard on the question as to the necessity of the appointment of another as guardian. And finally, the guardian so appointed may be removed whenever it is no longer proper that the ward should be under guardianship.—*In re Lundberg*, 143 Cal. 402, 77 Pac. 156, 159. The petitioner for a writ of habeas corpus for the custody of a child can not base his claim on a supposed rightful authority to control the child's person in this state by virtue of his appointment as guardian in another state, and the jurisdiction of a court of this state to decide, on habeas corpus, or other proper process, concerning the care and custody of infants is paramount, and can not be taken away by a decree of an inferior tribunal of this state; and where neither the petitioner nor the respondent is entitled to the custody of the child, the court, in the exercise of its sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, will determine to whose custody it shall be committed.—*Jones v. Bowman*, 13 Wyo. 79, 67 L. R. A. 860, 77 Pac. 439, 442.

(8) **Discharge and dismissal of writ.**—In a habeas corpus proceeding for the custody of a minor committed to a state reform school, the minor must be discharged from the custody of the superintendent of such institution and restored to the custody of his parents, where the facts show that he was illegally committed for want of notice to



his parents.—*Ex parte Becknell*, 119 Cal. 496, 497, 51 Pac. 692. And the writ of habeas corpus must be dismissed, where it appears that the child is not in the respondent's custody.—*In re Christal*, 141 Cal. 523, 524, 75 Pac. 103.

(9) *Former adjudication as res judicata.*—In a habeas corpus proceeding involving the custody of minor children, all matters in issue arising upon the same state of facts determined in a prior proceeding should be regarded as settled and concluded.—*In re Hamilton*, 66 Kan. 754, 71 Pac. 817. The principle of *res judicata* is applicable to proceedings on habeas corpus, so far, at least, as they involve an inquiry into and a determination of the rights of conflicting claimants to the custody of minor children. The decision on a former writ is conclusive in a subsequent application, unless some new fact has occurred which has altered the state of the case, or the relative claims of the parents or other contestants for the custody of the child in some material respect. Thus a judgment awarding the custody of a child to its adoptive parents is *res judicata* of the issues in a subsequent proceeding between the same parties on the same facts to vacate the order of adoption, though the former was a habeas corpus proceeding.—*In re Clifford*, 37 Wash. 460, 107 Am. St. Rep. 819, 79 Pac. 1001, 1002. Where the defendant, in a divorce suit here, had previously instituted a habeas corpus proceeding in another state, against his wife and her father, in which the custody of the children was awarded to each of the parents for alternate periods, that decision is not *res judicata* as to the custody of the children in the divorce suit in this state; where a change of conditions is shown, the court in such divorce suit may make a further decree as to such custody.—*Stewart v. Stewart*, 32 Ida. 180, 180 Pac. 165.

(10) *Writ of prohibition.*—A writ of prohibition to prevent proceedings before a district court, or the judge thereof, will not be issued in habeas corpus proceedings for the custody of a child, unless it is so clear that such court is acting outside of or beyond its jurisdiction that there is no reasonable doubt of the fact.—*In re Miller*, 4 Ida. 711, 43 Pac. 870, 871.

#### 8. Appeal in habeas corpus proceedings.

(1) *Appealability of judgment.*—The judgment of a district court in a habeas corpus proceeding involving the custody of a child is appealable; it is a final judgment.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. A judgment or order quashing a writ of habeas corpus and awarding the possession and custody of a minor child to one of the contending parties is a "final" order or judgment affecting substantial rights, made in a special proceeding; it is therefore appealable under the statute.—*Larson v. Dutton* (N. D.), 168 N. W. 625. In Kansas, an appeal will lie from a judgment of the district court in habeas corpus proceedings determining the rights of conflicting claimants to the custody of a child.—*Bleakley v. Smart*, 74 Kan. 476, 11 Ann. Cas. 125, 87 Pac. 76;

Miller v. Gordon, 93 Kan. 382, Ann. Cas. 1916D, 502, 144 Pac. 274; and in Colorado a decree in habeas corpus for the custody of an infant may be reviewed upon a writ of error, as such a decision clearly possesses every element necessary to constitute a final judgment. It is conclusive between the parties as to the only question and subject-matter before the court and presented in the record, namely, the custody of the child. Such an order, decision, judgment, or whatever it may be called, puts an end to the particular action. It leaves nothing further to be done in the determination, becomes *res judicata*, and therefore constitutes a final judgment.—McKercher v. Green, 13 Colo. App. 270, 58 Pac. 406, 408; but the appellate court will ordinarily decline to review the evidence.—In re Freeman, 54 Kan. 493, 38 Pac. 558.

(2) *Dismissal of appeal.*—No appeal lies from a non-appealable order, and the appeal will be dismissed if taken by a party who is not aggrieved by the refusal of the court to change the custody of the child.—St. Clair v. Williams, 23 Wash. 552, 63 Pac. 206. An appeal from a judgment denying a petition for a writ of habeas corpus to obtain the custody of an infant, will not be dismissed on the ground that the county court has disposed of the matter by a decree awarding the child in question to respondents under a petition for its adoption, a writ of review having been issued in the adoption proceedings since the perfection of the appeal.—Ex parte Turner, Turner v. Hendryx, 86 Or. 590, 167 Pac. 1019.

(3) *Trial de novo.*—On appeal from the judgment dismissing the writ in a habeas corpus proceeding to regain the custody of an infant, the review in Oregon is *de novo*, notwithstanding section 669 L. O. L.—Ex parte Turner, Turner v. Hendryx, 86 Or. 590, 167 Pac. 1019, 169 Pac. 109. A habeas corpus proceeding to recover the custody of an infant child is not triable anew in the supreme court of North Dakota.—Larson v. Dutton (N. D.), 172 N. W. 869. So in Wyoming, where an appeal is taken from a decision in a habeas corpus proceeding brought to secure the custody of a minor child, the case does not go before the appellate court for trial *de novo*; and the court, sitting as a court of review, in considering the evidence, will not assume to weigh it, but only look into the record to ascertain whether the judge abused his discretion in awarding the custody of the child.—Tytler v. Tytler, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 1, 3.

(4) *Effect of giving supersedeas bond.*—In a habeas corpus proceeding for the custody of a child, the giving of a supersedeas bond has no effect whatever upon the possession, custody, and control of the child in question. It does not give a right to the custody of the child, pending the appeal.—State v. Poindexter, 45 Wash. 37, 87 Pac. 1069.

(5) *Review.*—Where the findings in a habeas corpus proceeding to recover the custody of an infant child are based upon parol evidence, they will not be disturbed unless they are shown to be clearly wrong.—Larson v. Dutton (N. D.), 172 N. W. 869. In habeas corpus proceed-

ings involving the custody of a child, taken temporarily from the custody of its parents because of their neglect, the findings of the district court returning the custody to the parents will not be disturbed where the evidence is conflicting as to the reformation of the parents and as to their suitableness to have such custody.—*Jain v. Priest*, 30 Ida. 273, 164 Pac. 364. In determining the custody of a minor child in habeas corpus, the judgment of the lower court will not, on appeal, be disturbed because of conflict in the evidence where there is sufficient evidence, if uncontradicted, to sustain the judgment.—*Walker v. Edwards*, 32 Ida. 257, 181 Pac. 932. The supreme court of the state of Oklahoma has jurisdiction on appeal to review an order of the district court awarding the custody of a minor child to one of the parties in a habeas corpus proceeding, brought for the purpose of determining who has the right to the custody and control of such minor.—*Jamison v. Gilbert*, 38 Okla. 751, 47 L. R. A. (N. S.) 1133, 135 Pac. 342.

#### REFERENCES.

Habeas corpus for custody of children. See notes .20 Am. Dec. 330-337; 2 Am. St. Rep. 183-187. Habeas corpus decree as to custody of infant as *res judicata*. See note 67 L. R. A. 783-788. Custody of legitimate children on habeas corpus. *Church on Habeas Corpus*, 2d ed., pp. 665-732.

#### 9. Marriage of minor.

A minor on marrying becomes of lawful age so that he can sue in his own name.—*Ex parte Hollopeter*, 52 Wash. 41, 132 Am. St. Rep. 952, 17 Ann. Cas. 91, 21 L. R. A. (N. S.) 847, 100 Pac. 162. The marriage of a female infant after she has reached the age of consent emancipates her from all parental control which might otherwise be exercised by reason of her minority, and places her equally beyond further control of the court over her person in any guardianship proceeding based on such minority.—*Guardianship of Ambrose*, 170 Cal. 160, 149 Pac. 43. It is only when a marriage is contracted by a minor, who is incapable of consenting to marriage by reason of being under the age of consent, as provided in section 56 of the Civil Code, that the consent of parents or guardian is essential to its validity.—*Guardianship of Ambrose*, 170 Cal. 160, 149 Pac. 43. If a female who, although a minor, has arrived at the age of consent, becomes a party to a marriage regularly solemnized, the marriage is valid without regard to the consent of parent or guardian.—*Guardianship of Ambrose*, 170 Cal. 160, 149 Pac. 43.

#### 10. Contempt of court.

Appearing in court in response to a writ of habeas corpus and refusing to produce the body of a child pursuant to the requirements of such writ, without a reasonable excuse, or willfully making an evasive or insufficient answer thereto, is a contempt committed in the presence of the court.—*Smythe v. Smythe*, 28 Okla. 266, 114 Pac. 257.

**11. Contracts of minors.**

(1) **Minority in general.**—A law whereby the age of minority of a female child is increased from 18 years to 21, does not, if enacted after a girl has reached the age of 18, avail her for retaining property which she was to enjoy only during her minority.—*Smith v. Smith*, 104 Kan. 629, 180 Pac. 231. Land and the rents and profits thereof, which under decree of court rendered in a divorce case, have been set aside, out of the father's estate, for the support of the children of the marriage until the youngest of them reach mature age, is to be restored, on suit therefor by the father, when such age is reached by the youngest child.—*Smith v. Smith*, 104 Kan. 629, 180 Pac. 231.

(2) **Contracts, generally.**—The contract of a minor male, over the age of 18 years, to enter the army or navy is binding, and such minor can not rely for discharge on the ground of infancy alone.—*In re Oliver*, 1 Alaska 1. A contract made for the benefit of a minor child is not invalid because made with the child's stepfather who had no legal control over her.—*Steinberger v. Young*, 175 Cal. 81, 165 Pac. 432, 436. It is a commanding principle of justice, and has become one of the maxims of the law, that a minor can not apply to his own use the beneficial part of a transaction and reject its burdens.—*Peers v. McLaughlin*, 88 Cal. 294, 299, 22 Am. St. Rep. 306, 26 Pac. 119. A contract by a minor under the age of eighteen years for the purchase of a lot of land on installments was void ab initio, and was not subjected to ratification and could not be vitalized by the payment of installments after arriving at the age of eighteen.—*Maler v. Harbor Center Land Co.* (Cal. App.), 182 Pac. 345, 346. Where a minor disaffirms a contract for the purchase of a lot of land on installments entered into under eighteen years of age, such contract is void ab initio, and any loss sustained by the seller because of such disaffirmance is a result of his own mistake in entering into a void contract; and if the claim is based upon fraud of the minor in not disclosing his incapacity, and should be properly pleaded it could never be maintained separately as a suit for damages, and hence can not constitute a valid defense or counterclaim.—*Maler v. Harbor Center Land Co.* (Cal. App.), 182 Pac. 345, 346. Section 35 of the Civil Code of California requires a minor to restore the consideration of a contract upon electing to disaffirm it, only when the contract was entered into whilst he was over the age of eighteen years, and does not require a return or restoration of such consideration when the contract was entered into whilst he was under eighteen.—*Maler v. Harbor Center Land Co.* (Cal. App.), 182 Pac. 345, 346. The power of a minor to disaffirm a contract entered into during his minority at any time prior to majority or within a reasonable time thereafter is not impaired by the fact that he had a general guardian so as to bar his right to sue for the recovery of moneys paid on account of such contract after the running of the statutory period.—*Maler v. Harbor Center Land Co.* (Cal. App.), 182 Pac. 345, 346.

(3) **Conveyance or deed by Indian.**—A Creek Indian minor is legally incompetent to execute a conveyance of allotted lands inherited by him except pursuant to an order of the county court having jurisdiction, and the district court is without jurisdiction to give validity to a void conveyance executed by such minor, and its decree in an action between said minor and his grantee quieting title in the latter is void for want of jurisdiction, and does not divest such minor of his title.—*Crow v. Hardridge* (Okla.), 175 Pac. 115, 117. A deed executed by a Creek Indian minor to allotted lands inherited by him, not being made by his guardian pursuant to an order of the county court having jurisdiction, is null and void.—*Crow v. Hardridge* (Okla.), 175 Pac. 115, 116. A deed executed by a minor allottee of the Five Civilized Tribes, whose restrictions have been removed by the act of May 27, 1908, to his allotted lands, is void, and title thereto can only be obtained through proceedings in the county court as provided by statute.—*Allison v. Crummev* (Okla.), 166 Pac. 691, 692.

(4) **Joinder of guardian.**—A sale of a minor's interest in real estate made in 1912 by the guardian joining in a conveyance with the adult heir as provided by the act of congress of April 26, 1906, is a nullity.—*McCoy v. Mayo* (Okla.), 174 Pac. 491, 494. When it is desired that a minor join with the adult heirs in the sale of an inherited allotment, prior to statehood, such purpose could only be accomplished through the action of "a guardian, duly appointed by the proper United States court for the Indian Territory . . . upon the order of such court made upon petition filed by guardian."—*Talley v. Burgess*, 46 Okla. 550, 149 Pac. 120, 121. Section 22 of the act of congress of April 26, 1906, does not authorize an independent and separate sale of the interests of a minor, and a sale of such interest prior to the passage of the act of May 27, 1908, by a guardian, pursuant to an order of the court in the exercise of general probate jurisdiction, for the support and education of the minor, without joining with the adult heirs in a sale, does not pass the title of the minor.—*Lula*, Seminole Roll No. 908 v. *Powell* (Okla.), 166 Pac. 1050, 1052. The act of congress of April 26, 1906, authorizing the guardian of a minor Indian to join in the conveyance of real estate made by an adult heir conveying the interest of such minor was repealed by the act of May 27, 1908.—*McCoy v. Mayo* (Okla.), 174 Pac. 491, 494.

12. **Actions.**—A guardian of a minor Indian allottee can not by commencing an action to set aside a void conveyance of allotted lands in the name of such minor and afterwards entering into a compromise and settlement, by which the action is dismissed, divest the title of said minor to said lands, nor confer any rights upon the grantor in such void conveyance, nor give any validity thereto, nor create an estoppel against said allottee thereafter asserting the invalidity of such void conveyance.—*Bell v. Fitzpatrick* (Okla.), 157 Pac. 334, 336. The fact that a minor Indian allottee permitted a suit brought in her own name to set aside a void conveyance to her allotted lands, executed after

May 27, 1908, to be dismissed with prejudice, can not operate as a bar to a subsequent suit by her on attaining her majority to cancel said deed and to have the same removed as a cloud upon her title.—*Bell v. Fitzpatrick* (Okla.), 157 Pac. 334, 336. Where a guardian of a minor Indian allottee sells the surplus allotted lands of his ward, upon a secret understanding that the purchaser shall not pay for the same, and the sale is confirmed by the court and a deed executed and delivered to the purchaser, such facts constitute a fraud upon the estate of the ward, and the sale may be set aside in an action by the ward against the purchaser, or any other person who acquires rights in said lands with notice of the secret fraud.—*Allison v. Chummey* (Okla.), 166 Pac. 691, 693; *Langley v. Ford* (Okla.), 171 Pac. 471, 473. One who would contest an instrument in writing on the ground of the infancy of the maker has the burden of proof imposed on him.—*Tyrrell v. Shaffer* (Okla.), 174 Pac. 1074. A woman suing her divorced husband for money expended by her in supporting their child, can recover only her reasonable outlay rendered necessary by the defendant's neglect of parental duty.—*Cheever v. Kelly*, 96 Kan. 269, 150 Pac. 529. Under section 184 of the code of Washington, the father and, in case of his death or desertion, the mother has a cause of action for the death of a child resulting from the defendant's tort; and this applies to the case of the death of a child as the result of another person's negligent operation of a jitney bus, notwithstanding that a later enactment, known as the "Jitney Bus Act," gives a right of action to "every person injured" as the result of such negligent operation but makes no reference to the killing of a child.—*Bruner v. Little*, 97 Wash. 319, 166 Pac. 1166. An electric company is under no obligation to manage so that children shall be prevented from climbing its poles and coming into contact with its wires.—*Edwards v. Kansas City*, 104 Kan. 684, 180 Pac. 271. In prosecuting a parent on the charge of failure to support a minor child regard must be had to whether the person charged, having no independent means, has been able to obtain work, and if so, has been in a physical condition to perform it.—*People v. Smith* (Cal. App.), 175 Pac. 696. The burden of proving infancy rests upon him who alleges the infancy.—*Jordan v. Jordan* (Okla.), 162 Pac. 758.

## CHAPTER II.

## GUARDIANSHIP OF MINORS (Continued).

- § 70. Superior court to appoint guardians. On what petition.
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§ 104. When power of guardian is superseded.

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**§ 70. Superior court to appoint guardians. On what petition.**

The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper. In all such proceedings, when it appears to the satisfaction of the court, either from a verified petition, or from affidavits, that the welfare of the minor will be imperiled if such minor is allowed to remain in the custody of the person then having the care of such minor, the court may make an order providing for the temporary custody of such minor until a hearing can be had on such petition; and when it appears to the court that there is reason to believe that such minor will be carried out of the jurisdiction of the court before which the application is made, or will suffer some irreparable injury before compliance with such order providing for the temporary custody of such minor can be enforced, such court may at the time of making such order providing for the temporary custody of such minor cause a warrant to be issued, reciting the facts, and directed to the sheriff, coroner, or constable of the county, commanding such officer to take such minor from the custody of the person in whose care such minor then is and place



such minor in custody in accordance with the order of the court.—*Kerr's Cyc. Civ. Code*, § 1747.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, sections 1719, 1720.

Arizona\*—Revised Statutes of 1913, paragraph 1106.

Colorado—Mills's Statutes of 1912, sections 3337, 7900, 7911, 8050.

Idaho—Compiled Statutes of 1919, section 7857.

Kansas—General Statutes of 1915, section 5044.

Montana—Revised Codes of 1907, section 7753.

Nevada—Revised Laws of 1912, sections 6149, 6153.

New Mexico—Statutes of 1915, sections 2554, 2561.

North Dakota—Compiled Laws of 1913, sections 8527, 8874.

Oklahoma—Revised Laws of 1910, section 6522; Laws of 1910-11, chapter 25, page 45 (supervision of guardianship by commissioner of charities and corrections).

Oregon—Lord's Oregon Laws, sections 1310, 1311.

South Dakota—Compiled Laws of 1913, section 5983.

Utah—Compiled Laws of 1907, section 3994.

Washington—Laws of 1917, chapter 156, page 697, section 195.

Wyoming—Compiled Statutes of 1910, section 5735.

#### § 71. Form. Petition for appointment of guardian.

[Title of court.]

[Title of guardianship.]

{ Department No. —.  
[Title of form.]

To the Honorable the —<sup>1</sup> Court of the County<sup>2</sup> of —,  
State of —.

The petition of — respectfully shows:

That your petitioner is —<sup>3</sup> of —,<sup>4</sup> a minor child  
of —;<sup>5</sup>

That the said minor has no guardian legally appointed  
by will or otherwise, and is a resident of —,<sup>6</sup> and has  
estate within said county,<sup>7</sup> which needs the care and atten-  
tion of some fit and proper person;

That said estate consists of real estate and personal  
property, particularly described as follows, to wit:—;<sup>8</sup>

That therefore it is necessary and convenient that a  
guardian be appointed for the person and estate of said  
minor, —;

That said —<sup>9</sup> is of the age of — years,<sup>10</sup> and said minor is at present under the care of —;<sup>11</sup>

That the only relative of the said minor residing in said county<sup>12</sup> of — is —.<sup>13</sup>

Wherefore your petitioner prays that he, or some other fit and proper person, be appointed as guardian of the person and estate<sup>14</sup> of said minor; that notice be given to the said —;<sup>15</sup> and that a day for hearing this petition be set.

Dated —, 19—.

—, Petitioner.

Explanatory notes.—1 Title of court. 2 Or, city and county. 3 State relationship to minor. 4 Name of minor. 5, 6 Name the county in which appointment is sought. 7 Or, city and county. 8 Describe the property. 9 Name of minor. 10 Give age. 11 Name of custodian. 12 Or, city and county. 13 Name of relative. 14 Or, either, as the case may be. 15 Name of relative.

**§ 72. Form. Notice of application for letters of guardianship.**

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

Notice is hereby given, That — has filed with the clerk of this court a petition, praying for letters of guardianship of the person and estate of —, a minor, and that —,<sup>2</sup> the — day of —, 19—, at — o'clock in the forenoon<sup>3</sup> of said day, at the court-room of said court, department No. —, at the court-house<sup>4</sup> in the county<sup>5</sup> of —, has been fixed by said court for hearing said petition, when and where any person interested may appear and show cause why the said petition should not be granted.

Dated —, 19—.

—, Clerk.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Day of week. 3 Or, afternoon. 4 State location of court-house. 5 Or, city and county.

**§ 73. Form. Order appointing day for hearing petition for guardianship, and directing notice to be given.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

— having this day petitioned the court to be appointed guardian of the person and estate of said minor, —

It is ordered, That — <sup>2</sup> the — day of —, 19—, at — o'clock in the forenoon <sup>3</sup> of said day is appointed for the hearing of said petition, and that notice of the hearing be given to —, the person having care of said minor, and to the following named relative of said minor, residing in this county, <sup>4</sup> to wit, — and —, by citation to be served on said parties at least five days <sup>5</sup> before the hearing.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Day of week. <sup>3</sup> Or, afternoon. <sup>4</sup> Or, city and county. <sup>5</sup> Or, as directed by the court.

**§ 74. Form. Another form of order appointing day for hearing petition for guardianship, and directing notice to be given.**

[Title of court.]

[Title of guardianship.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

It is ordered by the court, That notice of the time and place of hearing the petition of — for the appointment of — as guardian of the person and estate of —, a minor child of — and —, <sup>2</sup> be given to —, who has custody of said minor, and to —, and to —, relatives of said minor, by notice served personally upon said persons at least — days before the time of such hearing, which hearing is now set down for —, 19—, at — o'clock in the forenoon <sup>3</sup> of said day.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Names of parents. <sup>3</sup> Or as the case may be.

**§ 75. Form. Consent of relative to appointment.**

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The undersigned, a relative of —, a minor, hereby consents that — may be appointed guardian of the person and estate <sup>2</sup> of said minor. —

Dated —, 19—.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or either of them.**§ 76. Form. Order appointing guardian.**

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The petition of —, praying to be appointed guardian of the person and estate of said minor, coming on regularly to be heard, upon due proof to the satisfaction of the judge of said court that notice has been given to the relatives of the said minor residing in this county,<sup>2</sup> and to the person under whose care said minor is, as required by law, and as directed by this court, and it duly appearing to the court that said minor has no legal guardian, that he is a resident of the said county,<sup>3</sup> and that he has estate within the state of —, which needs the care and attention of some fit and proper person, which estate is of the value of — dollars (\$—), or thereabouts, —

It is hereby ordered, That said — be, and he is hereby, appointed guardian of the person and estate of said minor, and that letters of guardianship of the person and estate of said minor be issued to the said — upon his giving bond to said minor in the sum of — dollars (\$—) and taking the oath required by law.

Dated —, 19—. — Judge of the — Court.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2, 3</sup> Or, city and county.

**§ 77. Form. Short form of order appointing guardian.**

[Title of court.]

[Title of guardianship.]

{	No. —.1	Dept. No. —.
	[Title of form.]	

The petition of — for the appointment of —<sup>2</sup> as guardian of the persons and estates of — and —, minors, coming on regularly this day to be heard, and it appearing that notice of said hearing has been duly given as directed by the court and required by law, the court, after hearing the evidence, grants said petition, —

It is therefore ordered by the court, That — be, and he is hereby, appointed guardian of the persons and estates of the said — and —,<sup>3</sup> minors, and that letters of guardianship be issued accordingly upon his giving a bond, conditioned according to law, to each of said minors,<sup>4</sup> in the sum of — dollars (\$—), and taking the oath required by law. —, County Clerk.

Entered —, 19—.

By —, Deputy.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Himself, or some other fit and proper person, naming him. <sup>3, 4</sup> Give their names.

**Orders and decrees need not be signed.**—There is no statutory provision in California for the signing of a judgment by the judge, either before or after entry; and his signature gives to it no additional solemnity or validity. The adoption of such a practice is merely to give the clerk a surer means of correctly entering what has been adjudged. The judgment is a judicial act of the court; the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk. After the court has pronounced a judgment in apt language, nothing more is left to be done except the ministerial act of the clerk in entering it, and especially so when what the court has pronounced has been entered in the minutes, then the judgment has been rendered, and the rights of the parties established.—*Estate of Cook*, 77 Cal. 220, 227, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.

The same rule applies, of course, to orders and decrees in probate proceedings; but in such proceedings § 1704 of the Code of Civil Procedure of California requires all orders and decrees of the court or judge to be entered at length in the minute-book of the court. The absence of the judge's signature would in no way impair the effect of the order or decree; and the statute does not require him to sign the minutes.

**§ 78. Form. Consent of guardian.**

[Title of court.]

[Title of guardianship.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

I, the above-named —, <sup>2</sup> hereby consent to be appointed as the general guardian of the person and estate <sup>3</sup> of the petitioner above named, and I hereby offer as my sureties the following persons, namely, — and —. <sup>4</sup>

Dated —, 19—.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Name of guardian. <sup>3</sup> Or either of them. <sup>4</sup> Naming them.

**§ 79. When minor may nominate guardian. When not.**

If the minor is under the age of fourteen years, the court may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly.—*Kerr's Cyc. Code Civ. Proc.*, § 1748.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1721.

Arizona\*—Revised Statutes of 1913, paragraph 1107.

Colorado—Mills's Statutes of 1912, sections 3337, 3338, 7911.

Idaho\*—Compiled Statutes of 1919, section 7843.

Kansas—General Statutes of 1915, section 5046.

Montana\*—Revised Codes of 1907, section 7754.

Nevada—Revised Laws of 1912, section 6151.

New Mexico—Statutes of 1915, sections 2555, 2580.

North Dakota\*—Compiled Laws of 1913, section 8875.

Oklahoma—Revised Laws of 1910, section 6523.

Oregon—Lord's Oregon Laws, section 1312.

South Dakota—Compiled Laws of 1913, section 5984.

Utah—Compiled Laws of 1907, section 3995.

Washington—Laws of 1917, chapter 156, page 697, section 197.

Wyoming\*—Compiled Statutes of 1910, section 5736.

**§ 80. Appointment of, by court. Minor over fourteen.**

If the guardian nominated by the minor is not approved by the court, or if the minor resides out of the state, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court or judge

may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years.—*Kerr's Cyc. Code Civ. Proc.*, § 1749.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1721.
- Arizona\*—Revised Statutes of 1913, paragraph 1108.
- Colorado—Mills's Statutes of 1912, sections 3337, 3338, 7911.
- Idaho\*—Compiled Statutes of 1919, section 7844.
- Kansas—General Statutes of 1915, section 5045.
- Montana\*—Revised Codes of 1907, section 7755.
- Nevada—Revised Laws of 1912, section 6151.
- New Mexico—Statutes of 1915, section 2560.
- North Dakota\*—Compiled Laws of 1913, section 8876.
- Oklahoma\*—Revised Laws of 1910, section 6524.
- Oregon—Lord's Oregon Laws, section 1312.
- South Dakota\*—Compiled Laws of 1913, section 5985.
- Utah—Compiled Laws of 1907, section 3995.
- Washington—Laws of 1917, chapter 156, page 697, section 197.
- Wyoming\*—Compiled Statutes of 1910, section 5737.

#### § 81. Nomination by minors after fourteen.

When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1750.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 1109.
- Colorado—Mills's Statutes of 1912, sections 3338, 7911.
- Idaho\*—Compiled Statutes of 1919, section 7845.
- Montana—Revised Codes of 1907, section 7756.
- Nevada—Revised Laws of 1912, section 6152.
- New Mexico—Statutes of 1915, section 2555.
- North Dakota\*—Compiled Laws of 1913, section 8877.
- Oklahoma\*—Revised Laws of 1910, section 6529.
- Oregon—Lord's Oregon Laws, section 1312.
- South Dakota—Compiled Laws of 1913, section 5986.
- Utah—Compiled Laws of 1907, section 3995.
- Washington—Laws of 1917, chapter 156, section 197.
- Wyoming\*—Compiled Statutes of 1910, section 5738.

**§ 82. Form. Nomination of guardian by minor.**

[Title of court.]

[Title of guardianship.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

I, —, a minor fourteen years of age, hereby nominate — as guardian of my person and estate,<sup>2</sup> and respectfully request this honorable court to appoint him, the said —, as such guardian. —

Dated —, 19—.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or either of them.**§ 83. Who may be guardian. Marriage does not affect guardianship.**

The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person. The person nominated by a minor of the age of fourteen years as his guardian, whether married or unmarried, may, if found by the court competent to discharge the duties of guardianship, be appointed as such guardian. The authority of a guardian is not extinguished nor affected by the marriage of the guardian. —*Kerr's Cyc. Code Civ. Proc.*, § 1751.

**Note.**—Before a corporation can engage in the business of acting as guardian of estates, it must file the affidavit and certificate of approval of the superintendent of banks required, respectively, by the Civ. Code, § 290a, as amended in 1913 and 1917. See Laws of 1917, chap. 502, p. 621.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1719.

Arizona\*—Revised Statutes of 1913, paragraph 1110.

Idaho—Compiled Statutes of 1919, section 7846.

Kansas—General Statutes of 1915, section 5045.

Montana—Revised Codes of 1907, section 7757.

Nevada—Revised Laws of 1912, section 6153; as amended by Statutes of 1918, chapter 84, page 27.

New Mexico—Statutes of 1915, section 2578.

North Dakota—Compiled Laws of 1913, sections 8682, 8878. }

Probate Law—13



Oklahoma—Revised Laws of 1910, section 6530; Laws of 1913, chapter 29, page 59; Laws of 1913, chapter 172, page 391; as amended by Laws of 1915, chapter 203, page 336 (act limiting guardianships).  
 Oregon—Lord's Oregon Laws, section 1310.  
 South Dakota—Compiled Laws of 1913, section 5987.  
 Utah—Compiled Laws of 1907, section 3995.  
 Washington—Laws of 1917, chapter 156, page 697, section 196.  
 Wyoming—Compiled Statutes of 1910, sections 5739-5941; Laws of 1915, chapter 143, page 205.

#### § 84. Powers and duties of guardian.

Every guardian appointed has the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged, unless he is appointed guardian only of the person of the ward. In that event, the guardian is charged with the custody of the ward, and must look to his support, health, and education. He may fix the residence of the ward at any place in the state, but not elsewhere without the permission of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1753.

Note.—The property of a minor shall not be leased for a longer period than ten years. See *Kerr's Cyc. Civ. Code*, § 718.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1722. See, also, Laws of 1917, chapter 16, page 34, as to power of board of children's guardians.  
 Arizona—Revised Statutes of 1913, paragraph 1112.  
 Colorado—Mills's Statutes of 1912, sections 3340, 3341.  
 Hawaii—Revised Laws of 1915, section 3036a, relative to the release by the guardian of an insane married person of his wards' curtesy or dower in realty, added by Laws of 1917, Act 90, page 127.  
 Idaho—Compiled Statutes of 1919, section 7847.  
 Kansas—General Statutes of 1915, sections 5049, 5050.  
 Montana—Revised Codes of 1907, section 7759.  
 Nevada—Revised Laws of 1912, section 6154; as amended by Statutes of 1913, chapter 34, page 27.  
 New Mexico—Statutes of 1915, sections 2568, 2575.  
 North Dakota—Compiled Laws of 1913, section 8880.  
 Oklahoma—Revised Laws of 1910, section 6532.  
 Oregon—Lord's Oregon Laws, section 1314.  
 South Dakota—Compiled Laws of 1913, section 5989.

Utah—Compiled Laws of 1907, section 4003.

Washington—Laws of 1917, chapter 156, page 699, sections 202-218.

Wyoming—Compiled Statutes of 1910, sections 5739-5741; Laws of 1915, chapter 143, page 205.

**§ 85. Bond of guardian, conditions of.**

Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the court must require of such person a bond to the minor with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein:

1. **INVENTORY.**—To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court may order.

2. **DISPOSITION AND MANAGEMENT OF ESTATE.**—To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward.

3. **ACCOUNT.**—To render an account on oath of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto.

**LETTERS OF GUARDIANSHIP.**—Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must

be substantially the same as the letters of administration, and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law.—*Kerr's Cyc. Code Civ. Proc.*, § 1754.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1723.
- Arizona\*—Revised Statutes of 1913, paragraph 1113.
- Colorado—Mills's Statutes of 1912, sections 7922, 7923, 7930.
- Idaho\*—Compiled Statutes of 1919, section 7849.
- Kansas—General Statutes of 1915, section 5047.
- Montana\*—Revised Codes of 1907, section 7760.
- Nevada—Revised Laws of 1912, section 6155.
- New Mexico—Statutes of 1915, sections 2562, 2564.
- North Dakota—Compiled Laws of 1913, sections 8683, 8684, 8685, 8692, 8881.
- Oklahoma\*—Revised Laws of 1910, section 6532.
- Oregon—Lord's Oregon Laws, section 1315.
- South Dakota\*—Compiled Laws of 1913, section 5990.
- Utah—Compiled Laws of 1907, section 3991.
- Washington—Laws of 1917, chapter 156, page 700, section 203.
- Wyoming\*—Compiled Statutes of 1910, section 5742.

#### § 86. Form. Bond of guardian upon qualifying.

[Title of court.]

[Title of guardianship.]

{ No. —, 1 Dept. No. —.  
[Title of form.]

Know all men by these presents: That we, — as principal, and — and — as sureties, are held and firmly bound unto —, a minor, in the sum of — dollars (\$—), lawful money of the United States of America, to be paid to the said —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas an order was made by the —<sup>2</sup> court of the county<sup>3</sup> of —, state of —, on the — day of —, 19—, appointing the above-bounden — the guardian of the person and estate of the said minor, and directing

that letters of guardianship be issued to him upon his giving a bond to the said minor with sufficient sureties, to be approved by the judge of said —<sup>4</sup> court, in the penal sum of — dollars (\$—), conditioned that said guardian shall faithfully execute the duties of his trust, according to law, —

Now, therefore, if the said — shall faithfully execute the duties of his trust according to law, then this obligation shall be void and of no effect; otherwise it shall remain in full force and effect.

Dated, signed, and sealed with our seals, this — day of —, 19—.

— [Seal]

— [Seal]

— [Seal]

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, city and county. 4 Title of court.

§ 87. Form. Justification of sureties on bond of guardian.

State of —, }  
County <sup>1</sup> of —, } ss.

— and —, the sureties named in the above bond, being duly sworn, each for himself says that he is a resident and householder <sup>2</sup> in said state, and is worth the sum of — dollars (\$—) over and above all his just debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.,<sup>3</sup>

Explanatory notes.—1 Or, city and county. 2 Or, freeholder. 3 Or other officer taking the oath.

**§ 88. Form. Bond of guardian (upon qualifying), executed by corporation.**

[Title of court.]

[Title of guardianship.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

Know all men by these presents: That we, — as principal, and the —<sup>2</sup> as surety, are held and firmly bound unto —, a minor, in the sum of — dollars (\$—), lawful money of the United States of America, to be paid to the said —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas an order was made by the —<sup>3</sup> court of the county<sup>4</sup> of —, state of —, on the — day of —, 19—, appointing the above-bounden — the guardian of the person and estate of the said minor, and directing that letters of guardianship be issued to him upon his giving a bond to the said minor with sufficient sureties, to be approved by a judge of said —<sup>5</sup> court, in the penal sum of — dollars (\$—), conditioned that said guardian shall faithfully execute the duties of his trust according to law, —

Now, therefore, if the said — shall faithfully execute the duties of his trust according to law, then this obligation shall be void; otherwise it shall remain in full force and effect.

In witness whereof, The seal and the signature of the said principal is hereto affixed, and the corporate seal and name of the said surety is hereto affixed and attested by its duly authorized officers, at —, state of —, this — day of —, 19—. [Seal]

[Corporate seal]

By —, President.  
—, Secretary.

**Explanatory notes.**—1 Give file number. 2 Give name of company, a corporation organized, acting, and existing under the laws of the state of —. 3 Title of court. 4 Or, city and county. 5 Title of court.

**§ 89. Form. Acknowledgment, by corporation, of execution of guardian's bond upon qualifying.**

[Title of court.]

[Title of guardianship.]

{ No. —. Dept. No. —.  
[Title of form.]

State of —,  
County <sup>1</sup> of —, } ss.

On this — day of —, one thousand nine hundred and — (19—), before me, —, a notary public in and for the county <sup>2</sup> of —, state of —, residing therein, duly commissioned and sworn, personally appeared —, known <sup>3</sup> to me to be the president, and —, known to me to be the secretary, of the —, <sup>4</sup> the corporation described in and that executed the above bond, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the said county <sup>5</sup> of —, the day and year in this certificate first above written.

—, Notary Public in and for the County <sup>6</sup> of —,  
State of —.

**Explanatory notes.**—1, 2 Or, City and County. 3 Or, proved by the testimony of —, a credible witness, as to the question of identification. 4 Name the company. 5, 6 Or, city and county.

**§ 90. Form. Letters of guardianship.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

State of —,  
County <sup>2</sup> of —, } ss.

— is hereby appointed guardian of the person and estate of —, a minor.

Witness —, clerk of the — <sup>3</sup> court of the county <sup>4</sup>

of —, with the seal of said court affixed, this — day of —, 19—.

By order of the court.

[Seal]

—, Clerk.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Or, City and County.  
3 Title of court. 4 Or, city and county.

### § 91. Form. Oath of guardian.

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

I do solemnly swear that I will support the constitution of the United States, and the constitution of the state of —; and that I will faithfully discharge the duties of guardian of the person and estate of —, a minor, according to law.

Subscribed and sworn to before me this — day of —, 19—. —, Deputy County Clerk.

Explanatory notes.—1 Give file number. 2 Or, City and County. The oath of the guardian must be indorsed on his letters: See Kerr's Cal. Cys. Code Civ. Proc., § 1754.

### § 92. Form. Certificate of clerk to copy of letters of guardianship.

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

I, —, county clerk of the county <sup>3</sup> of —, and ex officio clerk of the — <sup>4</sup> court, do hereby certify the foregoing to be a full, true, and correct copy of the letters of guardianship in the manner of the person and estate of —, a minor, now on file and of record in my office, and I further certify that the same have not been revoked or vacated.

Witness my hand and the seal of said court this —  
day of —, 19—.

[Seal]

By —, Deputy Clerk.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2,3</sup> Or, city and county.  
<sup>4</sup> Title of court.

**§ 93. Court may insert conditions in order.**

When any person is appointed guardian of a minor, the court may, with the consent of such person, insert in the order of appointment, conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor and for the care and custody of his property. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond shall be responsible.—*Kerr's Cyc. Code Civ. Proc.*, § 1755.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 1114.
- Idaho—Compiled Statutes of 1919, section 7850.
- North Dakota\*—Compiled Laws of 1913, section 8882.
- Oklahoma—Revised Laws of 1910, section 6533.
- South Dakota—Compiled Laws of 1913, section 5991.
- Utah—Compiled Laws of 1907, section 3988.
- Wyoming—Compiled Statutes of 1910, section 5743.

**§ 94. Letters and bond to be recorded.**

All letters of guardianship issued and all guardians' bonds executed under the provisions of this chapter, with the affidavits and certificates thereon, must be recorded by the clerk of the court having jurisdiction of persons and estates of the wards.—*Kerr's Cyc. Code Civ. Proc.*, § 1756.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 1115.
- Colorado—Mills's Statutes of 1912, section 8052.
- Idaho\*—Compiled Statutes of 1919, section 7851.
- Oklahoma\*—Revised Laws of 1910, section 6534.
- South Dakota\*—Compiled Laws of 1913, section 5992.
- Wyoming\*—Compiled Statutes of 1910, section 5744.



**§ 95.—Maintenance of minor out of income of his own property.**

If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian.—*Kerr's Cyc. Code Civ. Proc.*, § 1757.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 851.  
 Arizona\*—Revised Statutes of 1913, paragraph 1116.  
 Idaho\*—Compiled Statutes of 1919, section 7852.  
 Montana\*—Revised Codes of 1907, section 7761.  
 Nevada—Revised Laws of 1912, section 6160.  
 New Mexico—Statutes of 1915, section 2567.  
 North Dakota\*—Compiled Laws of 1913, section 8883.  
 Oklahoma\*—Revised Laws of 1910, section 6535.  
 South Dakota\*—Compiled Laws of 1913, section 5993.  
 Utah\*—Compiled Laws of 1907, section 3999.  
 Washington—Laws of 1917, chapter 156, page 703, section 210.  
 Wyoming—Compiled Statutes of 1910, section 5745.

**§ 96. Form. Petition for allowance for expenses of education and maintenance.**

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
 [Title of form.]

The undersigned, —, your petitioner, respectfully represents to this honorable court that he is the duly appointed, qualified, and acting guardian of the person and estate of —, a minor; that said minor has a father living; that it is for the best interests of said minor that he be educated at —;<sup>2</sup> that the sum of — dollars (\$—) per quarter or per annum will be required to nav

for his tuition, maintenance, necessary school books, etc., while attending said institution; that the father of said minor<sup>2</sup> is unable financially to expend the said sum for the education and maintenance of said minor, either at said institution or at any other suitable place, but that said minor has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford.

Your petitioner therefore prays that this court issue an order authorizing the said guardian to expend the said sum of — dollars (\$—) per quarter or per annum for the purposes above set forth. —, Petitioner.

—, Attorney for Petitioner.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Name the institution.  
<sup>3</sup> Briefly state situation of father's family, and circumstances of the case.

**§ 97. Form. Order of allowance for expenses of education and maintenance.**

[Title of court.]

[Title of guardianship.]

{ No. —. <sup>1</sup> Dept. No. —.  
 [Title of form.]

It having been shown to this court from the petition of —, the guardian of the person and estate of —, a minor, filed herein on the — day of —, 19—, that said minor has a father living, but who is not able to maintain and educate the said minor in a suitable manner; and that said minor has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, —

It is ordered, That —, the guardian of the person and estate of —, a minor, be, and he is hereby, authorized to expend the sum of — dollars (\$—), quarterly,<sup>2</sup>

out of the income of the estate of said minor, for the purposes of said minor's maintenance and education at ——.²

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—¹ Give file number. ² Or, annually. ³ Name the institution.

#### § 98. Powers and duties of testamentary guardians.

Every testamentary guardian must qualify and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except so far as his powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed, and except that such guardian need not give bond unless directed to do so by the court from which the letters of guardianship issue.—*Kerr's Cyc. Code Civ. Proc.*, § 1758.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1725.

Arizona—Revised Statutes of 1913, paragraph 1130.

Idaho—Compiled Statutes of 1919, section 7854.

Kansas—General Statutes of 1915, sections 5042, 5043.

Montana—Revised Codes of 1907, section 7762.

North Dakota—Compiled Laws of 1913, section 8884.

Oklahoma—Revised Laws of 1910, section 6536.

Oregon—Lord's Oregon Laws, section 1317.

South Dakota—Compiled Laws of 1913, section 5994.

Utah—Compiled Laws of 1907, section 3989.

Washington—Laws of 1917, chapter 156, page 703, section 211.

Wyoming—Compiled Statutes of 1910, section 5746.

#### § 99. Power to appoint guardian ad litem not impaired.

Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein.—*Kerr's Cyc. Code Civ. Proc.*, § 1759.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1726.

Arizona\*—Revised Statutes of 1913, paragraph 1131.

Hawaii—Revised Laws of 1915, section 3022.

**Idaho\***—Compiled Statutes of 1919, section 7855.

**Montana\***—Revised Codes of 1907, section 7763.

**Nevada**—Revised Laws of 1912, section 6161; as amended by Statutes of 1913, chapter 34, page 27.

**New Mexico**—Statutes of 1915, section 2571.

**North Dakota\***—Compiled Laws of 1913, section 8885.

**Oklahoma\***—Revised Laws of 1910, section 6537.

**Oregon**—Lord's Oregon Laws, section 1318.

**South Dakota\***—Compiled Laws of 1913, section 5995.

**Utah\***—Compiled Laws of 1907, section 3990.

**Washington**—Remington's 1915, Code section 1644.

**Wyoming\***—Compiled Statutes of 1910, section 5747.

**§ 100. Transfer of proceedings from one county to another county. Petition and order for removal.**

The superior court of any county in this state in which is now pending, or in which there may be hereafter commenced, any proceeding which has for its object the guardianship of the estate of any minor or insane or incompetent person, or the guardianship of the person of any minor or insane or incompetent person, or both the guardianship of the estate and the guardianship of the person of a minor or insane or incompetent person, may make an order transferring such proceeding to the superior court of any other county in this state, in the manner herein provided; except that no such proceeding shall be transferred to the court of any county which at the time of such proceeding would not have jurisdiction to issue original letters in such matter or proceeding.

To obtain an order for such removal, the guardian of the person or estate, or both, of such minor or insane or incompetent person, shall file in the superior court of the county where such proceeding is pending, a verified petition setting forth the following matters:

1. PETITION MUST SET FORTH, WHAT.—The name of the county to the superior court of which it is sought to remove such proceedings;
2. The name of the county or counties in which the ward resides and that in which the guardian reside[s];

3. The name of the county or counties in which the property of such ward is situated, and a designation of the character and condition thereof;

4. The reasons for such removal;

5. The names and residences, so far as they are known to said guardian, of any relatives of such minor ward residing in said county in which said proceeding is pending;

6. The names and residences, so far as the same are known to said guardian, of the relatives within the third degree of such insane or incompetent ward residing in said county.

NOTICE OF, AND TIME FOR, HEARING.—Upon filing such petition an order shall be made by the court or judge fixing a time for hearing said petition, which shall be not less than five days thereafter, and directing that a copy of such order be sent through the United States mail to each of said relatives of such minor or insane or incompetent ward, named in said petition as resident in the county in which said proceeding is pending. The court may require such other or further notice of said hearing as it may deem proper.

ORDER OF REMOVAL.—At the time fixed for the hearing of said petition any relatives of such ward, or any person interested in the estate of such ward, may appear and file written grounds of opposition to said petition. If after hearing the evidence of the petitioner, and contestant if any, it shall appear to the court that it is for the best interest and advantage of said ward, or of the estate of said ward that the removal of said proceeding be had to the court designated in said petition, or to the superior court of any other county, it shall enter an order directing the removal thereof to said court and directing the clerk to forward all papers on file therein to the clerk of the court to which said proceeding has been ordered removed, and thereafter the court to which said proceeding has been removed shall have jurisdiction of all proceedings

therein as fully as if said proceeding has been originally begun in said court.

**FEE OF CLERK.**—The clerk of the court to which said proceeding is removed shall be entitled to receive a fee of six dollars on filing the papers transmitted to him, in addition to the expense of such transmission, payable on receipt of the papers by him.—*Kerr's Cyc. Code Civ. Proc.*, § 1760.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Oklahoma—Laws of 1913, chapter 208, page 460 (transfers of guardianships and other proceedings legalized).

#### § 101. Form. Petition for removal of proceeding.

[Title of court.]

[Title of proceeding.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

To the Honorable the — Court of the County <sup>2</sup> of —.

The petition of — respectfully shows:

That the above-entitled proceeding, which has for its object the guardianship of —, <sup>3</sup> is now pending in the above-named court, and that your petitioner is the guardian of —; <sup>4</sup>

That your petitioner desires an order removing said proceeding to the — court of the county of —; <sup>5</sup>

That said ward now resides in the county of —, <sup>6</sup> and said guardian, your petitioner, resides in the county of —; <sup>7</sup>

That the property of said ward is situated in the county of —, <sup>8</sup> and is designated and is of the character and condition as follows: —; <sup>9</sup>

That the reasons for such removal are: —; <sup>10</sup>

That the names and residences, so far as they are known to said guardian, of any relatives of such minor ward residing in the county in which said proceeding is pending are: —. <sup>11</sup>

Wherefore petitioner prays that an order be made fixing a time for the hearing of this petition and directing

notice to be given, and that, after hearing, an order be made removing said proceeding to the — court of the county of —,<sup>12</sup> or such other order as may be proper.

[Add ordinary verification.] —, Petitioner.

**Explanatory notes.**—1 Give file number. 2 Or, City and County. 3, 4 The person and estate, or of the person, or of the estate, etc. 5, 6, 7, 8 Or, city and county. 9 Give description, character, and condition of the property. 10 That it is for the best interest and advantage of said ward, or of the estate of said ward, that said proceeding be removed as requested, for the following reasons, naming them. 11 Give names and residences of relatives of minor ward; or, in case of an insane or incompetent ward, give the names and residences of relatives, within the third degree, of such insane or incompetent ward, so far as the same are known to the guardian, residing in the county in which the proceeding is pending. 12 Or, city and county.

**§ 102. Form. Order fixing time of hearing on petition for removal.**

[Title of court.]

[Title of proceeding.]

{ No. —. 1 Dept. No. —.  
[Title of form.] }

—, guardian of the estate of —,<sup>2</sup> having filed a petition for the removal of the above-entitled proceeding to the — court of the county of —,<sup>3</sup> —

It is ordered, That the hearing on said petition be, and it is hereby, fixed for —,<sup>4</sup> the — day of —, 19—, at the court-room of the — court in the county of —,<sup>5</sup> department No. —, at — o'clock, —m.; and that a copy of this order be mailed to each of the relatives of said ward named in said petition as resident in this county, to wit, — and —.<sup>6</sup>

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2 Or, guardian of the person and estate, or guardian of the person, etc. 3 Or, city and county. 4 Day of the week. 5 Or, city and county. 6 Give names of relatives as in petition; also any other or further notice as ordered.

**§ 103. Form. Order for removal of proceeding.**

[Title of court.]

[Title of proceeding.]

{	No. ——.1	Dept. No. —.
	[Title of form.]	

The petition of —, guardian of —,<sup>2</sup> for an order removing the above-entitled proceeding to the — court of the county of —,<sup>3</sup> having been regularly heard by the court, after due proof made that a copy of the order fixing the time of hearing thereon had been mailed to each of the relatives of said ward as directed in said order; and it satisfactorily appearing to the court, from evidence adduced at said hearing, that it is for the best interest and advantage of said ward, —,<sup>4</sup> that the removal of said proceeding be had to the — court of the county of —,<sup>5</sup>

It is ordered, That the above-entitled proceeding be, and the same is hereby, removed to the — court of the county of —,<sup>6</sup> and the clerk of this court is hereby directed to forward all papers on file in said proceeding to the clerk of the — court of the county of —,<sup>7</sup> to which the same is hereby removed.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2 Of the person and estate, or of the estate, or of the person, etc. 3 Or, city and county. 4 Or, the estate of said ward, or said ward and his estate. 5, 6, 7 Or, city and county.

**§ 104. When power of guardian is superseded.**

The power of a guardian appointed by a court is superseded:

1. By order of the court;
2. If the appointment was made solely because of the ward's minority, by his attaining majority;
3. The guardianship over the person of the ward, by the marriage of the ward.—*Kerr's Cyc. Code Civ. Proc.*, § 1760[a].



**§ 104.<sup>1</sup> Guardian of estate of minor, etc. Notice to relatives, of what.**

At any time after the issuance of letters of guardianship upon the estate of any minor, insane, or incompetent person, any relative of the ward, or the attorney for such relative, may serve upon the guardian, or upon the attorney for the guardian, and file with the clerk of the court wherein administration of such ward's estate is pending, a written request, stating that he desires special notice of any or all of the following mentioned matters, steps, or proceedings in the administration of said estate, to wit:

1. Filing of petitions for sales, leases, or mortgages of any property of the ward's estate.
2. Filing of accounts.
3. Filing of application for removal of ward's property to any foreign jurisdiction.
4. Filing of petitions for partition of any property of the ward's estate.
5. Proceedings for removal, suspension, or discharge of the guardian, or final determination of the guardianship.

WRITTEN REQUEST SHALL CONTAIN WHAT. SERVICE.—Such request shall state the post-office address of such relative, or his attorney, and thereafter a brief notice of the filing of any of such petitions, applications, or accounts, or proceedings, except petitions for sale of perishable property, or other personal property which will incur expense or loss by keeping, shall be addressed to such relative, or his attorney, at his stated post-office address, and deposited in the United States post-office with the postage thereon prepaid, within two days after the filing of such petition, account, application, or the commencement of such proceeding; or personal service of such notices may be made on such relative, or his attorney, within said two days, and such personal service

shall be equivalent to such deposit in the post-office, and proof of mailing or of personal service must be filed with the clerk before the hearing of any such matter. If, upon the hearing it shall appear to the satisfaction of the court that the said notice has been regularly given, the court shall so find in its order of judgment, and such judgment shall be final and conclusive upon all persons.—*Kerr's Cyc. Code Civ. Proc.*, § 1761.

## CHAPTER III.

## POWERS AND DUTIES OF GUARDIANS.

- § 105. Payment of ward's debt by guardian.
- § 106. Same.
- § 107. Guardian to recover debts due his ward, and represent him.
- § 108. To manage estate, maintain ward, and to sell real estate.
- § 109. Form. Affidavit and order remitting clerk's fees.
- § 110. Form. Consent of guardian ad litem to settlement of administrator's account.
- § 111. Maintenance, support, and education of ward. How enforced.
- § 112. Powers of guardians in partition.
- § 112.1 Share of infant, if sold in partition proceedings, may be paid to his guardian.
- § 113. Inventory of ward's estate.
- § 114. Account of guardian.
- § 115. Form. Guardian's annual account.
- § 116. Form. Order appointing referee of guardian's account, and adjourning settlement.
- § 117. Allowance of accounts of joint guardians.
- § 118. Expenses and compensation of guardians.

## § 105. Payment of ward's debt by guardian.

Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate upon obtaining an order for the sale or mortgage thereof, and disposing of the same in the manner provided in article four of this chapter.—*Kerr's Cyc. Code Civ. Proc.*, § 1768.

## § 106. Same.

(This section, identical in wording with the next preceding section, was repealed by the Laws of 1919, chap. 110, p. 155.)

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1734.

Arizona—Revised Statutes of 1913, paragraph 1137.

Hawaii—Revised Laws of 1915, section 3034.  
 Idaho—Compiled Statutes of 1919, section 7860.  
 Kansas—General Statutes of 1915, section 6106.  
 Montana\*—Revised Codes of 1907, section 7769.  
 Nevada—Revised Laws of 1912, section 6165.  
 North Dakota—Compiled Laws of 1913, section 8891.  
 Oklahoma—Revised Laws of 1910, section 6542.  
 South Dakota—Compiled Laws of 1913, section 6000.  
 Utah—Compiled Laws of 1907, section 4008.  
 Washington—Laws of 1917, chapter 156, page 701, section 205.  
 Wyoming\*—Compiled Statutes of 1910, section 5748.

**§ 107. Guardian to recover debts due his ward, and represent him.**

Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court, compound for the same and give discharges to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose.—*Kerr's Cyc. Code Civ. Proc.*, § 1769.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1734.  
 Arizona\*—Revised Statutes of 1913, paragraph 1138.  
 Colorado—Mills's Statutes of 1912, sections 7947, 7949, 7960.  
 Hawaii—Revised Laws of 1915, sections 3018, 3041.  
 Idaho\*—Compiled Statutes of 1919, section 7861.  
 Kansas—General Statutes of 1915, sections 5050, 6106.  
 Montana\*—Revised Codes of 1907, section 7770.  
 Nevada\*—Revised Laws of 1912, section 6167.  
 New Mexico—Statutes of 1915, sections 2568, 2569.  
 North Dakota\*—Compiled Laws of 1913, section 8892.  
 Oklahoma—Revised Laws of 1910, section 6543.  
 Oregon—Lord's Oregon Laws, section 1327.  
 South Dakota—Compiled Laws of 1913, section 6001.  
 Utah\*—Compiled Laws of 1907, section 4009.  
 Washington—Laws of 1917, chapter 156, page 701, section 205.  
 Wyoming\*—Compiled Statutes of 1910, section 5749.

**§ 108. To manage estate, maintain ward, and to sell real estate.**

Every guardian must manage the estate of his ward frugally and without waste, and apply the income and

profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell or mortgage the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale or mortgage, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.—*Kerr's Cyc. Code Civ. Proc.*, § 1770.

Note.—The property of a minor shall not be leased for a longer period than ten years. See *Kerr's Cyc. Civ. Code*, § 718.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1735.

Arizona—Revised Statutes of 1913, paragraph 1139.

Hawaii—Revised Laws of 1915, sections 3018, 3035; Laws of 1917, Act 31, page 43, providing for sales of real estate of small value.

Idaho\*—Compiled Statutes of 1919, section 7862.

Montana—Revised Codes of 1907, section 7771.

Nevada—Revised Laws of 1912, section 6166.

New Mexico—Statutes of 1915, section 2568.

North Dakota—Compiled Laws of 1913, section 8893.

Oklahoma—Revised Laws of 1910, section 6544.

Oregon—Lord's Oregon Laws, section 1328.

South Dakota—Compiled Laws of 1913, section 6002.

Utah—Compiled Laws of 1907, section 4007.

Washington—Laws of 1917, chapter 156, page 701, section 205.

Wyoming—Compiled Statutes of 1910, section 5750.

#### § 109. Form. Affidavit and order remitting clerk's fees.

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

—, being first duly sworn, deposes and says: That she is the agent for the California Society for the Prevention of Cruelty to Children;<sup>2</sup> that she is the petitioner in the above-entitled case; that said minor named above is destitute, and wholly dependent upon charity for support, and has not the means wherewith to pay costs; and

that your petitioner, as said agent, has no funds out of which to pay the costs.

Wherefore she prays for an order of this court remitting the fees herein. —.

Subscribed and sworn to before me this — day of —, 19—. —, Deputy County Clerk.

Upon reading and filing the foregoing affidavit, and good cause appearing to the court therefor, it is ordered that the clerk of this court remit all fees in said matter.

Dated —, 19—. — Judge of the — Court.

Explanatory notes.—1 Give file number. 2 Or other society.

**§ 110. Form. Consent of guardian ad litem to settlement of administrator's account.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

I, —, appointed by the —<sup>2</sup> court of the county<sup>3</sup> of —, state of —, on the — day of —, 19—, to represent the minor, —, who is interested in the estate of —, deceased, upon the allowance and settlement of the —<sup>4</sup> account of the administrator<sup>5</sup> of the estate of said deceased, rendered and presented for settlement and filed in said court on the — day of —, 19—, hereby appear on behalf of said minor, —,<sup>6</sup> and consent to the allowance and approval of said account, and to the settlement thereof, as rendered and presented by said administrator.<sup>7</sup>

Dated —, 19—. —, Guardian ad litem.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, city and county. 4 State what account. 5 Or, executor. 6 Giving his name. 7 Or, executor, etc., according to the fact.

**§ 111. Maintenance, support, and education of ward. How enforced.**

When a guardian has advanced, for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or

his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support, or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.—*Kerr's Cyc. Code Civ. Proc.*, § 1771.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1140.

Colorado—Mills's Statutes of 1912, section 7950.

Idaho\*—Compiled Statutes of 1919, section 7863.

Montana\*—Revised Codes of 1907, section 7772.

New Mexico—Statutes of 1915, section 2567.

North Dakota\*—Compiled Laws of 1913, section 8894.

Oklahoma\*—Revised Laws of 1910, section 6545.

South Dakota\*—Compiled Laws of 1913, section 6003.

Utah\*—Compiled Laws of 1907, section 4013.

Wyoming\*—Compiled Statutes of 1910, section 5751.

#### § 112. Powers of guardians in partition.

The guardian may join in and assent to a partition of the real or personal estate of the ward, wherever such assent may be given by any person; provided, that such assent can only be given after the court having jurisdiction over said estate shall grant an order conferring such authority, which order shall only be made after a hearing in open court upon the petition of the guardian after notice of at least ten days, mailed by the clerk of the court to all the known relatives of the ward residing in the county where the proceedings are pending. The guardian may also consent to a partition of the real or

personal estate of his ward without action, and agree upon the share to be set off to such ward, and may execute a release in behalf of his ward to the owners of the shares, of the parts to which they may be respectively entitled, upon obtaining from said court having jurisdiction over said estate, authority to so consent after a hearing in open court upon the petition of the guardian after notice of at least ten days, mailed by the clerk of the court to all the known relatives of the ward residing in the county where the proceedings are pending.—*Kerr's Cyc. Code Civ. Proc.*, § 1772.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Hawaii—Revised Laws of 1915, section 3036.

Idaho—Compiled Statutes of 1919, section 7864.

Montana—Revised Codes of 1907, section 7773.

Nevada—Revised Laws of 1912, section 6154.

Oklahoma—Revised Laws of 1910, section 6546.

Oregon—Lord's Oregon Laws, section 482.

South Dakota—Compiled Laws of 1913, section 6004.

Utah—Compiled Laws of 1907, section 4012.

Wyoming—Compiled Statutes of 1910, section 5752.

§ 112.<sup>1</sup> Share of infant, if sold in partition proceedings, may be paid to his guardian.

When the share of an infant is sold (in partition proceedings), the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 793.

§ 113. Inventory of ward's estate.

Every guardian must return to the court a verified inventory of the estate of his ward within three months after his appointment. He must annually thereafter, and at such other times as directed by the court, render a verified account of the estate of his ward. All the estate of the ward described in the first inventory must be ap-



praised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estates of decedents. Such inventory, with the appraisal of the property therein described, must be recorded by the clerk of the court in a proper book kept in his office for that purpose and whenever any ward is or has been during the guardianship confined in a state hospital for the insane in this state a copy of said inventory must be served upon the secretary of the state commission in lunacy or its attorney. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisal thereof and the service of the same as are herein provided in relation to the first inventory and return.

**REFUSAL OF GUARDIAN TO RETURN INVENTORY.**—If within the time prescribed, or within such further time, not exceeding two months which the court or judge shall for reasonable cause allow, the guardian neglects or refuses to return the inventory or render his account, the court may, upon notice, revoke the letters of guardianship and the guardian shall be liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.—*Kerr's Cyc. Code Civ. Proc.*, § 1773.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

**Alaska**—Compiled Laws of 1913, section 1736.

**Arizona**—Revised Statutes of 1913, paragraph 1142.

**Colorado**—Mills's Statutes of 1912, sections 7955, 7956, 8019, 8035, 8052.

**Hawaii**—Revised Laws of 1915, section 3037.

**Idaho**—Compiled Statutes of 1919, section 7865.

**Kansas**—General Statutes of 1915, sections 5048, 6105.

**Montana**—Revised Codes of 1907, section 7774.

**Nevada**—Revised Laws of 1912, section 6168.

**New Mexico**—Statutes of 1915, section 2574.

**North Dakota**—Compiled Laws of 1913, section 8895.

Oklahoma—Revised Laws of 1910, section 6549.  
Oregon—Lord's Oregon Laws, section 1329.  
South Dakota—Compiled Laws of 1913, section 6005.  
Utah—Compiled Laws of 1907, sections 4010, 4011.  
Washington—Laws of 1917, chapter 156, page 701, section 205.  
Wyoming—Compiled Statutes of 1910, section 5753.

**§ 114. Account of guardian.**

The guardian must upon the expiration of a year from the time of his appointment and as often thereafter as he may be required, present his account to the court for settlement and allowance; provided, that no account of the guardian of any insane person, who is or has been during such guardianship confined in a state hospital in this state, shall be settled or allowed unless notice of the settlement of said account shall have been first given to the secretary of the state commission in lunacy or its attorney at least five days before the hearing. The termination of the relation of guardian and ward by the death of either guardian or ward or by the ward attaining his majority or being restored to capacity shall not cause the court to lose jurisdiction of the proceeding for the purpose of settling the accounts of the guardian.—*Kerr's Cyc. Code Civ. Proc.*, § 1774.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 1143.  
Colorado—Mills's Statutes of 1912, sections 8019, 8029.  
Idaho—Compiled Statutes of 1919, section 7866.  
Kansas—General Statutes of 1915, sections 5062, 6120.  
Montana—Revised Codes of 1907, section 7775.  
Nevada—Revised Laws of 1912, section 6167.  
New Mexico—Statutes of 1915, sections 2570, 2575.  
North Dakota—Compiled Laws of 1913, section 8896.  
Oklahoma—Revised Laws of 1910, section 6550.  
South Dakota—Compiled Laws of 1913, section 6006.  
Utah—Compiled Laws of 1907, sections 4010, 4011.  
Washington—Laws of 1917, chapter 156, page 701, section 114.  
Wyoming—Compiled Statutes of 1910, section 5754.

**§ 115. Form. Guardian's annual account.**

[Title of court.]

[Title of matter.]

{	No. ——.1	Dept. No. —.
	[Title of form.]	

I, —, general guardian of —, an infant, do hereby make, render, and file the following account, and respectfully represent:

That I was, on the —, day of —, 19—, duly appointed by the — court of the county <sup>2</sup> of —, state of —, the general guardian of the person and estate of —, a minor, having no guardian legally appointed by will or deed, and who is an inhabitant<sup>3</sup> of the said county <sup>4</sup> of —, state of —;<sup>5</sup>

That within three months after my said appointment as guardian of the person and estate of said —, a minor, I returned to this honorable court a verified inventory of the estate of my said ward;

That Schedule A, hereinafter set forth, hereby referred to, signed by me, and hereby made a part of this, my first annual account, contains a full and true statement of all of the property of said ward now remaining in my hands;

That Schedule B, hereinafter set forth, hereby referred to, signed by me, and hereby made a part of this, my first annual account, contains a full and true statement of the manner in which I have disposed of the property of said ward not now remaining in my hands;

That Schedule C, hereinafter set forth, hereby referred to, signed by me, and hereby made a part of this, my first annual account, contains a full and true statement of the amount and nature of each investment of money made by me, and of the manner in which the fund is at present invested;

That Schedule D, hereinafter set forth, hereby referred to, signed by me, and hereby made a part of this, my first annual account, contains a full and true account, in the form of debtor and creditor, of all my receipts and disbursements of money by reason of said guardianship,

since —, the date of my appointment as such guardian, and distinctly states the amount of the balance remaining in my hands, to be charged to me in the next year's account, as the sum of — dollars (\$—).

Dated —, 19—.

Respectfully submitted.

—, Guardian of the Person and Estate of —, a Minor.

#### Schedule A.

[Give statement of property remaining on hand; as, "I now have on hand," etc.<sup>6</sup>]

#### Schedule B.

[State manner in which property not on hand was disposed of.]

#### Schedule C.

[State amount and nature of investments made.]

#### Schedule D.

—, Guardian of the Person and Estate of —, a Minor.

Dr.

To —	.....	\$—
—	.....	—
—	.....	\$—

Cr.

By —	.....	\$—
—	.....	—
—	.....	—
		—
Balance on hand.....		\$—

#### VERIFICATION.

State of —, }  
County of —, } ss.

—, being duly sworn, says that the foregoing account by him subscribed is true, of his own knowledge, except as to those matters therein stated to be on information, and as to those matters he believes it to be true.

Subscribed and sworn to before me this — day of  
—, 19—. —, Notary Public.<sup>8</sup>

**Note.**—A guardian has it in his power to receive payment of all demands of his ward, and to make an effectual sale or other disposition of many kinds of personal property. The account should therefore consist of a charge of the whole amount of the personal estate, the same as if it were cash, with credit for the expenditures and losses only, and with a statement of the balance on hand, including both cash and personal property. The report should then show how the money is invested and of what the property consists.

**Explanatory notes.**—1 Give file number. 2 Or, city and county. 3 Or, resident. 4 Or, city and county. 5 Or, who resides without the state, and has estate within the said county, or city and county. 6 Give description. 7 Or, city and county. 8 Or, other officer taking oath.

**§ 116. Form. Order appointing referee of guardian's account, and adjourning settlement.**

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

—, the guardian of the person and estate of —, a minor, having rendered his account for settlement, and notice of such settlement having been duly given as directed by this court, —

It is hereby ordered, That —, Esq., be, and he is hereby, appointed a referee to examine the said account and to make report thereon to this court within — days,<sup>2</sup> and that the settlement of said account be adjourned until —,<sup>3</sup> the — day of —, 19—, at — o'clock, in the forenoon<sup>4</sup> of said day.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Title of court. 2 State the number of days. 3 Day of week. 4 Or, afternoon.

**§ 117. Allowance of accounts of joint guardians.**

When an account is rendered by two or more joint guardians, the court may, in its discretion, allow the same upon the oath of any of them.—*Kerr's Cyc. Code Civ. Proc.*, § 1775.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1748.  
 Arizona\*—Revised Statutes of 1913, paragraph 1144.  
 Hawaii—Revised Laws of 1915, section 3039.  
 Idaho\*—Compiled Statutes of 1919, section 7867.  
 Montana\*—Revised Codes of 1907, section 7776.  
 Nevada\*—Revised Laws of 1912, section 6194.  
 North Dakota\*—Compiled Laws of 1913, section 8897.  
 Oklahoma\*—Revised Laws of 1910, section 6551.  
 Oregon\*—Lord's Oregon Laws, section 1341.  
 South Dakota\*—Compiled Laws of 1913, section 6007.  
 Wyoming\*—Compiled Statutes of 1910, section 5755.

**§ 118. Expenses and compensation of guardians.**

Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

He must also be allowed all reasonable and proper disbursements, made after the legal termination of the guardianship, but while that relation, by consent or acquiescence of the parties, still subsists in fact, and before the discharge of the guardian by the court, and which were made by the consent, express or implied, of the ward, and for his benefit or the benefit of his estate.—*Kerr's Cyc. Code Civ. Proc.*, § 1776.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

- Alaska—Compiled Laws of 1913, section 1747.  
 Arizona—Revised Statutes of 1913, paragraph 1145.  
 Colorado—Mills's Statutes of 1912, section 8032.  
 Hawaii—Revised Laws of 1915, section 3038.  
 Idaho—Compiled Statutes of 1919, section 7868.  
 Kansas—General Statutes of 1915, section 5067.  
 Nevada—Revised Laws of 1912, section 6191.  
 North Dakota—Compiled Laws of 1913, section 8898.  
 Oklahoma—Revised Laws of 1910, section 6552.  
 Oregon—Lord's Oregon Laws, section 1340.  
 South Dakota—Compiled Laws of 1913, section 6008.  
 Utah—Compiled Laws of 1907, section 4014.  
 Washington—Laws of 1917, chapter 156, page 705, section 216.  
 Wyoming—Compiled Statutes of 1910, section 5756.

## CHAPTER IV.

## SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

- § 119. May sell in certain cases.
- § 120. Sale of real estate to be made upon order of court.
- § 121. Application of proceeds of sales.
- § 122. Investment of proceeds of sales.
- § 123. Order for sale, how obtained.
- § 124. Form. Petition of guardian for order of sale.
- § 125. Form. Verification of guardian's petition for order of sale.
- § 126. Notice to next of kin, how given.
- § 127. Form. Order to show cause why application for leave to sell real estate should not be granted.
- § 128. Form. Order for sale of property by guardian.
- § 129. Form. Notice of guardian's sale of real estate (at public auction).
- § 130. Form. Notice of guardian's sale of real estate (at private sale).
- § 131. Copy of order to be served, published, or consent filed.
- § 132. Hearing of application.
- § 133. Who may be examined on such hearing.
- § 134. Costs to be awarded to whom.
- § 135. Order of sale to specify what.
- § 136. Bond before selling.
- § 137. Form. Bond of guardian on sale of real estate.
- § 138. Form. Justification of sureties on guardian's bond for sale of real property.
- § 139. Proceedings to conform with what title.
- § 139.1 Proceedings for the completion of contracts for sale of real estate by guardians.
- § 140. Limit of order of sale.
- § 141. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.
- § 142. Court may order investment of money of ward.

**§ 119. May sell in certain cases.**

When the income of an estate under guardianship is insufficient to maintain the ward and his family or to maintain and educate the ward when a minor, or to pay for his care, treatment, and support, if confined in a state hospital for the insane, his guardian may sell his real or personal estate, or mortgage the real estate for

that purpose, upon obtaining an order therefor; provided, that no such order shall be granted when the ward is or has been, during the guardianship, confined in a state hospital for the insane in this state unless notice of the proceedings shall have been given to the secretary of the state commission in lunacy or its attorney at least five days before the hearing.—*Kerr's Cyc. Code Civ. Proc.*, § 1777.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

- Alaska—Compiled Laws of 1913, section 1750.
- Arizona—Revised Statutes of 1913, paragraph 1146.
- Colorado—Mills's Statutes of 1912, section 8016.
- Idaho—Compiled Statutes of 1919, section 7869.
- Kansas—General Statutes of 1915, sections 5051, 6108.
- Nevada—Revised Laws of 1912, section 6169.
- New Mexico—Statutes of 1915, sections 2586, 2587.
- North Dakota—Compiled Laws of 1913, section 8899.
- Oklahoma—Revised Laws of 1910, section 6553.
- Oregon—Lord's Oregon Laws, section 1346.
- South Dakota—Compiled Laws of 1913, section 6009.
- Utah—Compiled Laws of 1907, section 4015.
- Washington—Laws of 1917, chapter 156, page 703, section 212.
- Wyoming—Compiled Statutes of 1910, section 5757.

**§ 120. Sale of real estate to be made upon order of court.**

When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose upon obtaining an order therefor.—*Kerr's Cyc. Code Civ. Proc.*, § 1778.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1751.
- Arizona\*—Revised Statutes of 1913, paragraph 1147.
- Colorado—Mills's Statutes of 1912, section 7968.
- Hawaii—Revised Laws of 1915, section 3046.
- Idaho\*—Compiled Statutes of 1919, section 7870.
- Nevada—Revised Laws of 1912, section 6170.
- Probate Law—15



New Mexico—Statutes of 1915, section 2587.  
North Dakota\*—Compiled Laws of 1913, section 8900.  
Oklahoma\*—Revised Laws of 1910, section 6554.  
Oregon—Lord's Oregon Laws, section 1347.  
South Dakota\*—Compiled Laws of 1913, section 6010.  
Utah—Compiled Laws of 1907, section 4015.  
Washington—Laws of 1917, chapter 156, page 703, section 212.  
Wyoming\*—Compiled Statutes of 1910, section 5758.

**§ 121. Application of proceeds of sales.**

If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.—*Kerr's Cyc. Code Civ. Proc.*, § 1779.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1752.  
Arizona\*—Revised Statutes of 1913, paragraph 1148.  
Hawaii—Revised Laws of 1915, section 3048.  
Idaho\*—Compiled Statutes of 1919, section 7871.  
Nevada—Revised Laws of 1912, section 6171.  
North Dakota\*—Compiled Laws of 1913, section 8901.  
Oklahoma\*—Revised Laws of 1910, section 6555.  
Oregon—Lord's Oregon Laws, section 1348.  
South Dakota\*—Compiled Laws of 1913, section 6011.  
Utah\*—Compiled Laws of 1907, section 4016.  
Wyoming\*—Compiled Statutes of 1910, section 5759.

**§ 122. Investment of proceeds of sales.**

If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1780.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1753.  
 Arizona\*—Revised Statutes of 1913, paragraph 1149.  
 Colorado—Mills's Statutes of 1912, section 7946.  
 Hawaii—Revised Laws of 1915, section 3047.  
 Idaho\*—Compiled Statutes of 1919, section 7872.  
 Montana\*—Revised Codes of 1907, section 7783.  
 Nevada—Revised Laws of 1912, section 6172.  
 New Mexico—Statutes of 1915, section 2572.  
 North Dakota\*—Compiled Laws of 1913, section 8902.  
 Oklahoma\*—Revised Laws of 1910, section, 6556.  
 Oregon\*—Lord's Oregon Laws, section 1349.  
 South Dakota\*—Compiled Laws of 1913, section 6012.  
 Utah\*—Compiled Laws of 1907, section 4017.  
 Wyoming—Compiled Statutes of 1910, section 5760.

**§ 123. Order for sale, how obtained.**

To obtain an order for such sale, the guardian must present to the court in which he was appointed guardian a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.—*Kerr's Cyc. Code Civ. Proc.*, § 1781.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1755.  
 Arizona\*—Revised Statutes of 1913, paragraph 1150.  
 Colorado—Mills's Statutes of 1912, section 7969.  
 Hawaii—Revised Laws of 1915, section 3052.  
 Idaho\*—Compiled Statutes of 1919, section 7873.  
 Kansas—General Statutes of 1915, sections 5052, 6109.  
 Montana\*—Revised Codes of 1907, section 7784.  
 Nevada—Revised Laws of 1912, section 6173.  
 New Mexico—Statutes of 1915, section 2586.  
 North Dakota\*—Compiled Laws of 1913, section 8903.  
 Oklahoma\*—Revised Laws of 1910, section 6557.  
 Oregon—Lord's Oregon Laws, section 1351.  
 South Dakota\*—Compiled Laws of 1913, section 6013.  
 Washington—Laws of 1917, chapter 156, page 703, section 213.  
 Wyoming\*—Compiled Statutes of 1910, section 5761.

**§ 124. Form. Petition of guardian for order of sale.**

[Title of court.]

[Title of estate and guardianship.]

{ Department No. —.  
[Title of form.] }

To the Honorable the —<sup>1</sup> Court of the County <sup>2</sup> of  
—, State of —.

The petition of —, the guardian of the person and estate of —, a minor, respectfully shows:

That on the — day of —, 19—, letters of guardianship were issued to your petitioner by this court; that your petitioner thereupon duly entered upon the discharge of his duties as such guardian; and that such letters have not been revoked;

That within three months after his appointment, to wit, on the — day of —, 19—, —, your petitioner, duly returned to this court a true inventory, and an appraisement of all of the estate, real and personal, of his said ward that has come to his possession or knowledge;

That it is necessary \* that all of the property of said ward, both real and personal, shall be sold;

That Schedule A, hereunto annexed, and made a part of this petition, contains a description of the real and personal estate of said ward, and sets forth the condition of such estate;

That the facts and circumstances upon which this petition is founded, and which render a sale of the said property necessary, are fully set forth in Schedule B, hereunto annexed, and made a part of this petition.

Wherefore your petitioner prays that this honorable court make an order directing the next of kin of the said ward, and all persons interested in the said estate, to appear before this court at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate; and that upon such hearing this honorable court may

order said real estate to be sold, and that such other or further order may be made as is meet in the premises.

Dated —, 19—.

—, Guardian of the Person and Estate of —, a Minor.

Schedule A.

[Describe the estate of the ward, and set forth its condition.]

Schedule B.

[State the facts and circumstances upon which the petition is founded, and which show that a sale of the ward's property is necessary.]

—, Attorney for Guardian.

[Add ordinary verification.]

Schedule A.—Give description of real property. Give description of personal property.

Schedule B.—Set forth condition of ward's estate, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

Explanatory notes.—1 Title of court. 2 Or, City and County. 3 Or, expedient, as the case may be.

§ 125. Form. Verification of guardian's petition for order of sale.

[Title of court.]

[Title of estate and guardianship.]

{ Department No. —.  
[Title of form.]

State of —, }  
County <sup>1</sup> of —, } ss.

—, the petitioner above named, being duly sworn, says that he has read the foregoing petition, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters which are therein stated on his information or belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.<sup>2</sup>

Explanatory notes.—1 Or, City and County. 2 Or other officer taking the oath.

**§ 126. Notice to next of kin, how given.**

If it appear to the court, or a judge thereof, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary, or would be beneficial to the ward, to sell the personal estate, or some part of it, the court must order the sale to be made.—*Kerr's Cyc. Code Civ. Proc.*, § 1782.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1756.  
 Arizona\*—Revised Statutes of 1913, paragraph 1151.  
 Colorado—Mills's Statutes of 1912, section 7970.  
 Hawaii—Revised Laws of 1915, sections 3053, 3058.  
 Idaho\*—Compiled Statutes of 1919, section 7874.  
 Kansas—General Statutes of 1915, sections 5052, 6109.  
 Montana\*—Revised Codes of 1907, section 7785.  
 Nevada—Revised Laws of 1912, sections 6174, 6178.  
 North Dakota—Compiled Laws of 1913, section 8904.  
 Oklahoma\*—Revised Laws of 1910, section 6558.  
 Oregon—Lord's Oregon Laws, section 1352.  
 South Dakota\*—Compiled Laws of 1913, section 6014.  
 Wyoming\*—Compiled Statutes of 1910, section 5762.

**§ 127. Form. Order to show cause why application for leave to sell real estate should not be granted.**

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
 [Title of form.]

—, the guardian of the persons and estates <sup>2</sup> of —, and —, minors, having this day presented to this court, and filed herein, his petition, duly verified, praying for an order of sale of certain real property belonging to

the said minors, for the causes and reasons therein set forth; and it appearing to this court from the said petition that it is necessary, and would be beneficial to the said minors, that the said real estate described in said petition or some part of it shall be sold, —

It is hereby ordered, That the next of kin of said minors, and all persons interested in their said estates, appear before this court, in the court-room thereof,<sup>3</sup> in the county<sup>4</sup> of —, state of —, on —,<sup>5</sup> the — day of —, 19—, at — o'clock in the forenoon<sup>6</sup> of said day, to show cause why an order should not be granted for the sale of such estate, as prayed for in said petition, reference to which is hereby made for further particulars.

And it is hereby further ordered, That a copy of this order be published at least once a week for three successive weeks<sup>7</sup> in a newspaper printed and published in said county<sup>8</sup> of —, state of —.

Dated —, 19—. —, Judge.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or according to the fact. <sup>3</sup> State location of court-room. <sup>4</sup> Or, city and county. <sup>5</sup> Day of week. <sup>6</sup> Or, afternoon. <sup>7</sup> Or as prescribed by statute. <sup>8</sup> Or, city and county.

§ 128. Form. Order for sale of property by guardian.

[Title of court.]

[Title of estate.] { No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Now comes —, the guardian of said —, a minor, by Mr. —, his attorney, and presents his petition for authority to sell certain property of said minor; and said guardian, by his attorney, having proved to the satisfaction of the court that due publication of the order to show cause herein has been duly made as required by law and by the order of the court,<sup>2</sup> the court proceeds to the hearing of said petition, and, after hearing the evidence and proofs offered, the court finds that a sale of all of the interest of the said ward in the property hereinafter described is necessary,<sup>3</sup> —

It is therefore ordered by the court, That said —, as guardian of said —, be, and he is hereby, authorized to sell at private <sup>4</sup> sale, in the manner and form prescribed by law, and after notice in form and manner as required by law,<sup>5</sup> and upon the following terms, to wit, —,<sup>6</sup> all of the interest of the said ward in the property hereinafter described; and that before making said sale, said guardian give a bond, in the form required by law, in the penal sum of — dollars (\$—).

The real estate hereby authorized to be sold is described as follows to wit; —.<sup>7</sup> —, County Clerk.

Entered —, 19—.

By —, Deputy.<sup>8</sup>

**Explanatory notes.**—1 Give file number. 2 Or, that all persons interested in said real estate, and next of kin of said ward, have subscribed and filed their written consent to the making of the order applied for herein. If the matter has been continued, say here: "and the hearing having been regularly postponed to this day." 3 "Because," stating the reasons; or, "will be beneficial to the said ward, for the reason that," stating the reasons. 4 Or, public. 5 And on a day not less than eight days (or as otherwise prescribed) from the first publication of the notice. 6 State the terms. 7 Describe the land. 8 See note § 77, ante.

**§ 129. Form. Notice of guardian's sale of real estate (at public auction).**

[Title of court.]

[Title of guardianship.]

{ No. —. <sup>1</sup> Dept. No. —  
[Title of form.]

Notice is hereby given, That, in pursuance of an order of the —<sup>2</sup> court of the county <sup>3</sup> of —, state of —, made on the — day of —, 19—, in the above-entitled matter, the undersigned, —, the guardian of the estate of —, a minor, will sell at public auction, in one parcel, to the highest bidder, for cash, and subject to confirmation by said —<sup>4</sup> court, on —,<sup>5</sup> the — day of —, 19—, at the hour of — o'clock, noon,<sup>6</sup> in front of —,<sup>7</sup> county <sup>8</sup> of —, all the right, title, interest, and estate of the said —, a minor, in and to an undivided one twenty-first of that certain lot, piece, or parcel of

land situate, lying, and being in the county<sup>8</sup> of —, state of —, and particularly described as follows, to wit: —.<sup>10</sup>

Subject, however, to a life estate therein for the life of —.

Terms and conditions of sale: Cash, in gold coin of the United States. Ten (10) per cent of the purchase-money to be paid on the day of the sale, and the balance on confirmation of sale by said —<sup>11</sup> court. Deed and abstract at expense of purchaser.

—, Guardian of the Estate of —, a Minor.

—, Attorney for Guardian.<sup>12</sup>

**Explanatory notes.**—1 Give file number. 2 Title of court. 3 Or, city and county. 4 Title of court. 5 Day of week. 6 Or as the case may be. A sale at public auction must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day: Kerr's Cal. Cyc. Code Civ. Proc., § 1548. 7 Court-house or other place. 8, 9 Or, city and county. 10 Describe the land. 11 Title of court. 12 Give address.

**§ 130. Form. Notice of guardian's sale of real estate (at private sale).**

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

Notice is hereby given, That, in pursuance of an order of the — court<sup>2</sup> of the county<sup>3</sup> of —, state of —, duly given and made on the — day of —, 19—, in the above-entitled estate, —, guardian of the person and estate of —, a minor, will sell, on or after —, the — day of —, 19—, in the county<sup>4</sup> of —, state of —, to the highest and best bidder, and upon the terms and conditions hereinafter mentioned, at private sale, subject to confirmation by said —<sup>5</sup> court, the following described real property belonging to the estate of said minor, —.<sup>6</sup>

Terms and conditions of sale: Cash, in United States gold coin, upon delivery of the deed of said guardian, and



after confirmation of sale by said —<sup>7</sup> court; deed at expense of purchaser.<sup>8</sup>

Bids and offers must be in writing, and may be left at the office of Messrs. —,<sup>9</sup> attorneys for said guardian, or may be delivered to said guardian personally, or may be filed with the clerk of said —<sup>10</sup> court, at any time after the first publication of this notice and before the making of said sale.

Dated —, 19—.

—, Guardian of the Person and Estate of —, a Minor.

— and —,<sup>11</sup> Attorneys for Guardian.

**Explanatory notes.**—1 Give file number. 2 Title of court. 3, 4 Or, city and county. 5 Title of court. 6 Give description. 7 Title of court. 8 Or, ten (10) per cent of the purchase price or purchase-money to be paid in cash, gold coin of the United States, at the time of sale; balance on confirmation of sale, in cash, or in deferred payments, to be evidenced by the promissory note or notes of purchaser or purchasers, secured by a mortgage or mortgages on the real estate sold, with such additional security as the court shall deem necessary and sufficient to secure the prompt payment of the amounts so deferred and the interest thereon. Deeds and abstracts at the expense of purchasers; the purchasers to assume the payment of, and take the property purchased subject to, all state and county taxes, and all assessments, charges, and encumbrances, of whatsoever name or nature, which are now or may hereafter become chargeable to or a lien against the property so to be purchased. Or, the terms of said sale will be cash, gold coin of the United States of America, and the entire amount of such bid or offer must be paid at the time of submitting or delivering said written bid. Or, cash in United States gold coin; ten (10) per cent of the purchase price payable at the time of sale, and balance on confirmation of sale by said court and delivery of deed; and taxes for the current fiscal year to be prorated. Or as the case may be. 9 Give address. 10 Title of court. 11 Give address.

**§ 131. Copy of order to be served, published, or consent filed.**

A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least once a week for three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then

in such newspaper as may be specified by the court in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published.—*Kerr's Cyc. Code Civ. Proc.*, § 1783.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1757.
- Arizona—Revised Statutes of 1913, paragraph 1152.
- Colorado—Mills's Statutes of 1912, sections 7971, 7975.
- Idaho—Compiled Statutes of 1919, section 7875.
- Kansas—General Statutes of 1915, sections 5052, 6109.
- Montana\*—Revised Codes of 1907, section 7786.
- Oklahoma—Revised Laws of 1910, section 6559.
- Oregon—Lord's Oregon Laws, section 1353.
- South Dakota\*—Compiled Laws of 1913, section 6015.
- Wyoming—Compiled Statutes of 1910, section 5763.

**§ 132. Hearing of application.**

The court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of the next of kin, and of all other persons interested in the estate who oppose the application.—*Kerr's Cyc. Code Civ. Proc.*, § 1784.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 1153.
- Colorado—Mills's Statutes of 1912, section 7976.
- Idaho\*—Compiled Statutes of 1919, section 7876.
- Montana\*—Revised Codes of 1907, section 7787.
- North Dakota\*—Compiled Laws of 1913, section 8905.
- Oklahoma\*—Revised Laws of 1910, section 6560.
- South Dakota\*—Compiled Laws of 1913, section 6016.
- Wyoming\*—Compiled Statutes of 1910, section 5764.

**§ 133. Who may be examined on such hearing.**

On the hearing, the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and

testimony may be issued by the court, in the same manner and with like effect as in other cases provided for in this title.—*Kerr's Cyc. Code Civ. Proc.*, § 1785.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

**Arizona\***—Revised Statutes of 1913, paragraph 1154.  
**Idaho\***—Compiled Statutes of 1919, section 7877.  
**Montana\***—Revised Codes of 1907, section 7788.  
**Nevada**—Revised Laws of 1912, sections 6175, 6176.  
**North Dakota**—Compiled Laws of 1913, section 8906.  
**Oklahoma**—Revised Laws of 1910, section 6561.  
**South Dakota\***—Compiled Laws of 1913, section 6017.  
**Wyoming\***—Compiled Statutes of 1910, section 5765.

#### § 134. Costs to be awarded to whom.

If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award the costs to the party prevailing, and enforce the payment thereof.—*Kerr's Cyc. Code Civ. Proc.*, § 1786.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

**Alaska**—Compiled Laws of 1913, section 1767.  
**Arizona\***—Revised Statutes of 1913, paragraph 1155.  
**Hawaii**—Revised Laws of 1915, section 3055.  
**Idaho\***—Compiled Statutes of 1919, section 7878.  
**Montana\***—Revised Codes of 1907, section 7789.  
**Nevada**—Revised Laws of 1912, section 6177.  
**Oklahoma\***—Revised Laws of 1910, section 6562.  
**Oregon**—Lord's Oregon Laws, section 1363.  
**South Dakota\***—Compiled Laws of 1913, section 6018.  
**Wyoming\***—Compiled Statutes of 1910, section 5766.

#### § 135. Order of sale to specify what.

If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same

has been prayed for in the petition, order such sale to be made either at public or private sale.—*Kerr's Cyc. Code Civ. Proc.*, § 1787.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1156.  
 Colorado—Mills's Statutes of 1912, sections 7977, 7978.  
 Idaho\*—Compiled Statutes of 1919, section 7879.  
 Kansas—General Statutes of 1915, sections 5051, 6110, 6111.  
 Montana\*—Revised Codes of 1907, section 7790.  
 Nevada—Revised Laws of 1912, section 6178.  
 New Mexico—Statutes of 1915, section 2587.  
 North Dakota\*—Compiled Laws of 1913, section 8907.  
 Oklahoma\*—Revised Laws of 1910, section 6563.  
 South Dakota\*—Compiled Laws of 1913, section 6019.  
 Wyoming\*—Compiled Statutes of 1910, section 5767.

**§ 136. Bond before selling.**

Every guardian authorized to sell real estate, must, before the sale, give bond to the ward, with sufficient surety, to be approved by the court, or a judge thereof, with condition to sell the same in the manner, and to account for the proceeds of the sale as provided for in this chapter and chapter seven of this title.—*Kerr's Cyc. Code Civ. Proc.*, § 1788.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1759.  
 Arizona—Revised Statutes of 1913, paragraph 1157.  
 Colorado—Laws of 1915, chapter 173, page 491, amending Mills's Statutes of 1912, section 7923.  
 Hawaii—Revised Laws of 1915, section 3056.  
 Idaho\*—Compiled Statutes of 1919, section 7880.  
 Kansas—General Statutes of 1915, sections 5057, 6103.  
 Montana\*—Revised Codes of 1907, section 7791.  
 Nevada—Revised Laws of 1912, section 6179.  
 New Mexico—Statutes of 1915, sections 2587, 2588.  
 North Dakota—Compiled Laws of 1913, sections 8686, 8908.  
 Oklahoma—Revised Laws of 1910, section 6564.  
 South Dakota\*—Compiled Laws of 1913, section 6020.  
 Utah—Compiled Laws of 1907, section 3991.  
 Wyoming\*—Compiled Statutes of 1910, section 5768.

## § 137. Form. Bond of guardian on sale of real estate.

[Title of court.]

[Title of estate.]

{	No. —. 1	Dept. No. —.
	[Title of form.]	

Know all men by these presents: That we, — as principal, and — and — as sureties, are held and firmly bound to said —, a minor, in the sum of — dollars (\$—), lawful money of the United States of America, to be paid to the said —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas an order was made on the — day of —, 19—, by the —<sup>2</sup> court of the county<sup>3</sup> of —, state of —, authorizing the above-named principal, as guardian of the estate of —, to sell certain real estate of said ward, and bond in the sum above named was ordered to be given before the sale, —

Now, therefore, if the said —, as such guardian, shall sell the said real estate in the manner prescribed by law for sales of real estate by executors and administrators, and shall account for and dispose of the proceeds of the sale in the manner provided by law, then this obligation to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals, this — day of —, 19—. — [Seal]

— [Seal]

— [Seal]

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, city and county.

**§ 138. Form. Justification of sureties on guardian's bond for sale of real property.**

[Title of court.]

[Title of estate and guardianship.]

{ No. —, 1 Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

— and —, being duly sworn, each for himself says,  
That he is one of the sureties named in the above bond;  
that he is a householder <sup>3</sup> and resident within said state,  
and is worth the said sum of — dollars (\$—) over  
and above all his just debts and liabilities, exclusive of  
property exempt from execution. — ;  
— ;

Subscribed and sworn to before me this — day of  
—, 19—. —, Notary Public, etc.<sup>4</sup>

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 Or,  
freeholder. 4 Or other officer taking the oath.

**§ 139. Proceedings to conform with what title.**

All the proceedings under petition of guardians for  
sales of property of their wards, giving notice and the  
hearing of such petitions, granting or refusing the order  
of sale, directing the sale to be made at public or private  
sale, reselling the same property, return of sale and  
application for confirmation thereof, notice and hearing  
of such application, making orders rejecting or confirm-  
ing sales and reports of sales, ordering and making con-  
veyances of property sold, accounting and the settle-  
ment of accounts, must be had and made as required by  
the provisions of this title concerning estates of dece-  
dents, unless otherwise specially provided in this chapter.  
—*Kerr's Cyc. Code Civ. Proc.*, § 1789.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1737.

Arizona\*—Revised Statutes of 1913, paragraph 1158.

Colorado—Mills's Statutes of 1912, sections 7978, 7982, 7984, 7985.

Idaho\*—Compiled Statutes of 1919, section 7881.

Kansas—General Statutes of 1915, sections 5059, 5060, 6112, 6113, 6114, 6116.

Montana\*—Revised Codes of 1907, section 7792.

North Dakota\*—Compiled Laws of 1913, section 8909.

Oklahoma\*—Revised Laws of 1910, section 6565.

Oregon—Lord's Oregon Laws, sections 1330, 1355, 1357.

South Dakota\*—Compiled Laws of 1913, section 6021.

Utah—Compiled Laws of 1907, section 4015.

Washington—Laws of 1917, chapter 156, section 214.

Wyoming\*—Compiled Statutes of 1910, section 5769.

**§ 139.<sup>1</sup> Proceedings for the completion of contracts for sale of real estate by guardians.**

All proceedings for the completion of contracts for the sale of real estate by guardians must be had and made as required by the provisions of this title concerning the conveyance of real estate by executors and administrators under sections fifteen hundred and ninety-seven to sixteen hundred and seven, inclusive, of this code, and said sections are hereby made applicable to conveyances by guardians as provided by section eighteen hundred and ten a.—*Kerr's Cyc. Code Civ. Proc.*, § 1789a.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Kansas—General Statutes of 1915, section 5060.

**§ 140. Limit of order of sale.**

No order of sale granted in pursuance of this article continues in force more than one year after granting the same, without a sale being had.—*Kerr's Cyc. Code Civ. Proc.*, § 1790.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1762.

Arizona\*—Revised Statutes of 1913, paragraph 1159.

Idaho\*—Compiled Statutes of 1919, section 7882.

Montana\*—Revised Codes of 1907, section 7793.

North Dakota\*—Compiled Laws of 1913, section 8910.

Oklahoma\*—Revised Laws of 1910, section 6566.

Oregon—Lord's Oregon Laws, section 1358.

South Dakota\*—Compiled Laws of 1913, section 6022.

Wyoming—Compiled Statutes of 1910, section 5770.

**§ 141. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.**

All sales of real estate of wards must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as in the discretion of the court is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes, and a mortgage on the real estate sold, with such additional security as the court deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon.—*Kerr's Cyc. Code Civ. Proc.*, § 1791.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 1160.
- Colorado—Mills's Statutes of 1912, section 7978.
- Idaho—Compiled Statutes of 1919, section 7883.
- Montana\*—Revised Codes of 1907, section 7794.
- North Dakota—Compiled Laws of 1913, section 8911.
- Oklahoma\*—Revised Laws of 1910, section 6567.
- South Dakota—Compiled Laws of 1913, section 2023.
- Wyoming\*—Compiled Statutes of 1910, section 5771.

**§ 142. Court may order investment of money of ward.**

The court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects as circumstances require.—*Kerr's Cyc. Code Civ. Proc.*, § 1792.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1737.
  - Arizona\*—Revised Statutes of 1913, paragraph 1161.
- Probate Law—16



Colorado—Mills's Statutes of 1912, section 7946.  
Hawaii—Revised Laws of 1915, sections 3047, 3049.  
Idaho\*—Compiled Statutes of 1919, section 7884.  
Kansas—General Statutes of 1915, section 5050.  
Montana\*—Revised Codes of 1907, section 7795.  
Nevada—Revised Laws of 1912, section 6180.  
New Mexico—Statutes of 1915, section 2572.  
North Dakota\*—Compiled Laws of 1913, section 8912.  
Oklahoma\*—Revised Laws of 1910, section 6569.  
Oregon—Lord's Oregon Laws, section 1330.  
South Dakota\*—Compiled Laws of 1913, section 6024.  
Utah\*—Compiled Laws of 1907, section 4018.  
Wyoming\*—Compiled Statutes of 1910, section 5772.

## CHAPTER V.

## NON-RESIDENT GUARDIANS AND WARDS.

- § 143. Guardians of non-resident persons.
- § 144. Powers and duties of guardians appointed.
- § 145. Such guardians to give bonds.
- § 146. To what guardianship shall extend.
- § 147. Removal of non-resident ward's property.
- § 148. Proceedings on such removal.
- § 149. Discharge of person in possession.

**§ 143. Guardians of non-resident persons.**

The superior court may appoint a guardian of the person and estate, or either, of a minor, insane or incompetent person, who has no guardian within the state, legally appointed by will, deed, or otherwise, and who resides without the state, and has estate within the county, or, who, though not having such estate, is within the county, upon petition of any friend of such person or any one interested in his estate, in expectancy or otherwise. Before making such appointment, the court must cause notice to be given to all persons interested, in such manner as such court deems reasonable.—*Kerr's Cyc. Code Civ. Proc.*, § 1793.

## ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska—Compiled Laws of 1913, section 1743.
- Arizona—Revised Statutes of 1913, paragraph 1162.
- Colorado—Mills's Statutes of 1912, sections 7913, 7914, 7917.
- Hawaii—Revised Laws of 1915, section 3031.
- Idaho—Compiled Statutes of 1919, section 7885.
- Montana—Revised Codes of 1907, section 7796.
- Nevada—Revised Laws of 1912, section 6187.
- North Dakota—Compiled Laws of 1913, section 8913.
- Oklahoma—Revised Laws of 1910, section 6570.
- Oregon—Lord's Oregon Laws, section 1336.
- South Dakota—Compiled Laws of 1913, section 6025.
- Washington—Laws of 1917, chapter 156, page 699, section 199.
- Wyoming—Compiled Statutes of 1910, section 5773.

**§ 144. Powers and duties of guardians appointed.**

Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.—*Kerr's Cyc. Code Civ. Proc.*, § 1794.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1744.
- Arizona\*—Revised Statutes of 1913, paragraph 1163.
- Colorado—Mills's Statutes of 1912, sections 7913, 7917.
- Hawaii—Revised Laws of 1915, section 3032.
- Idaho\*—Compiled Statutes of 1919, section 7886.
- Montana\*—Revised Codes of 1907, section 7797.
- Nevada\*—Revised Laws of 1912, section 6188.
- North Dakota\*—Compiled Laws of 1913, section 8914.
- Oklahoma—Revised Laws of 1910, section 6571.
- Oregon\*—Lord's Oregon Laws, section 1337.
- South Dakota—Compiled Laws of 1913, section 6026.
- Utah\*—Compiled Laws of 1907, section 4020.
- Washington—Laws of 1917, chapter 156, page 699, section 202.
- Wyoming\*—Compiled Statutes of 1910, section 5774.

**§ 145. Such guardians to give bonds.**

Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state.—*Kerr's Cyc. Code Civ. Proc.*, § 1795.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1745.
- Arizona\*—Revised Statutes of 1913, paragraph 1164.
- Colorado—Mills's Statutes of 1912, sections 7913, 7917.
- Hawaii—Revised Laws of 1915, section 3033.
- Idaho\*—Compiled Statutes of 1919, section 7887.
- Montana\*—Revised Codes of 1907, section 7798.
- Nevada\*—Revised Laws of 1912, section 6189.

North Dakota\*—Compiled Laws of 1913, section 8915.  
Oklahoma\*—Revised Laws of 1910, section 6572.  
Oregon—Lord's Oregon Laws, section 1338.  
South Dakota\*—Compiled Laws of 1913, section 6027.  
Utah\*—Compiled Laws of 1907, section 4021.  
Washington—Laws of 1917, chapter 156, page 700, sections 203, 204.  
Wyoming\*—Compiled Statutes of 1910, section 5775.

**§ 146. To what guardianship shall extend.**

The guardianship which is first lawfully granted of any person residing without this state extends to all the estate of the ward within this state, and excludes the jurisdiction of the court of every other county.—*Kerr's Cyc. Code Civ. Proc.*, § 1796.

**ANALOGOUS AND IDENTICAL STATUTES,**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1746.  
Arizona\*—Revised Statutes of 1913, paragraph 1165.  
Colorado—Mills's Statutes of 1912, sections 7913, 7916, 8050.  
Idaho\*—Compiled Statutes of 1919, section 7888.  
Kansas—General Statutes of 1915, section 5073.  
Montana\*—Revised Codes of 1907, section 7799.  
Nevada—Revised Laws of 1912, section 6190.  
Oklahoma\*—Revised Laws of 1910, section 6573.  
Oregon\*—Lord's Oregon Laws, section 1339.  
South Dakota\*—Compiled Laws of 1913, section 6028.  
Utah\*—Compiled Laws of 1907, section 4022.  
Wyoming\*—Compiled Statutes of 1910, section 5776.

**§ 147. Removal of non-resident ward's property.**

When the guardian and ward are both non-residents, and the ward is entitled to property in this state, which may be removed to another state or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or foreign country of the residence of the ward, upon the application of the guardian to the superior court of the county in which the estate of the ward, or the principal part thereof, is situated.—*Kerr's Cyc. Code Civ. Proc.*, § 1797.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1166.

Colorado—Mills's Statutes of 1912, sections 7953, 7954.

Idaho—Compiled Statutes of 1919, section 7889.

Kansas—General Statutes of 1915, section 5073.

Montana—Revised Codes of 1907, section 7800.

North Dakota\*—Compiled Laws of 1913, section 8916.

Oklahoma\*—Revised Laws of 1910, section 6574.

South Dakota\*—Compiled Laws of 1913, section 6029.

Utah\*—Compiled Laws of 1907, section 4023.

Washington—Laws of 1917, chapter 156, page 705, section 217.

Wyoming\*—Compiled Statutes of 1910, section 5777.

**§ 148. Proceedings on such removal.**

The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, and upon such application the non-resident guardian must produce and file a certificate, under the hand of the clerk and seal of the court, from which his appointment was derived, showing:

1. A transcript of the record of his appointment.

2. That he has entered upon the discharge of his duties.

3. That he is entitled, by the laws of the state of his appointment to the possession of the estate of the ward; or, must produce and file a certificate, under the hand and seal of the clerk of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul, or vice-consul of the United States, resident in such country, that, by the laws of such country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court. Upon such application, unless good cause to the contrary is shown, the court must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.—*Kerr's Cyc. Code Civ. Proc.*, § 1798.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraphs 1167, 1168.  
 Colorado—Mills's Statutes of 1912, sections 7953, 7954.  
 Idaho—Compiled Statutes of 1919, section 7890.  
 Kansas—General Statutes of 1915, section 5073.  
 Montana—Revised Codes of 1907, section 7801.  
 North Dakota—Compiled Laws of 1913, section 8917.  
 Oklahoma—Revised Laws of 1910, section 6575.  
 South Dakota—Compiled Laws of 1913, section 6030.  
 Utah\*—Compiled Laws of 1907, section 4024.  
 Washington—Laws of 1917, chapter 156, page 705, section 217.  
 Wyoming\*—Compiled Statutes of 1910, section 5778.

## § 149. Discharge of person in possession.

Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the clerk of the court a receipt therefor of a foreign guardian of such absent ward, and transmitting a duplicate receipt, or a certified copy of such receipt, to the court from which such non-resident guardian received his appointment.—*Kerr's Cyc. Code Civ. Proc.*, § 1799.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 1169.  
 Colorado—Mills's Statutes of 1912, sections 7953, 7954.  
 Idaho—Compiled Statutes of 1919, section 7891.  
 Montana—Revised Codes of 1907, section 7806.  
 North Dakota—Compiled Laws of 1913, section 8918.  
 Oklahoma—Revised Laws of 1910, section 6576.  
 South Dakota—Compiled Laws of 1913, section 6031.  
 Utah\*—Compiled Laws of 1907, section 4025.  
 Wyoming—Compiled Statutes of 1910, section 5779.

## CHAPTER VI.

## GENERAL AND MISCELLANEOUS PROVISIONS.

- § 150. Examination of persons suspected of defrauding wards or of concealing property.
- § 151. Removal and resignation of guardian, and surrender of estate.
- § 152. Guardianship, how terminated.
- § 153. New bond, when required.
- § 154. Guardian's bond to be filed. Action on.
- § 155. Limitation of actions on guardian's bond.
- § 156. Limitation of actions for the recovery of property sold.
- § 157. More than one guardian may be appointed.
- § 158. Order appointing guardian, how entered.
- § 159. What provisions of code apply to guardians.
- § 160. Decree that conveyance be made for incompetent.
- § 160.1 Conveyance by guardian.
- § 160.2 Attorneys' fees against minor fixed by court.

## GUARDIAN AND WARD.

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| <ul style="list-style-type: none"> <li>1. Appointment of guardians. <ul style="list-style-type: none"> <li>(1) Jurisdiction of court.</li> <li>(2) Right to appointment.</li> <li>(3) Necessity of petition and notice.</li> <li>(4) Circumstances for consideration.</li> <li>(5) Bond. Estoppel.</li> <li>(6) Appointment here, notwithstanding foreign guardian.</li> <li>(7) Evidence of appointment.</li> <li>(8) Validity of appointment.</li> <li>(9) Certiorari.</li> <li>(10) Res judicata.</li> <li>(11) Collateral attack.</li> </ul> </li> <li>2. Guardianship of Indians. <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) Indians as wards of the government.</li> <li>(3) Enrollment, allotment, and alienation.</li> <li>(4) Acts of congress.</li> <li>(5) Disposition by will as an alienation.</li> <li>(6) Restrictions upon alienation.</li> <li>(7) Same. Extension of period of restriction.</li> <li>(8) Same. Approval of Secretary of Interior.</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>(9) Same. Approval and jurisdiction of court.</li> <li>(10) Removal of restrictions.</li> <li>(11) Marketable title.</li> <li>(12) Probate attorney.</li> <li>3. Control of property, support, maintenance, and custody of ward. <ul style="list-style-type: none"> <li>(1) Control of property.</li> <li>(2) Support and maintenance.</li> <li>(3) Contract for support.</li> <li>(4) Support of abandoned child.</li> <li>(5) Custody of ward. Access.</li> </ul> </li> <li>4. Duties and powers of guardians. <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) Power of guardian as to contracts.</li> <li>(3) Same. Contracts with Indians.</li> <li>(4) Same. Sale of minor's interest not valid unless made how.</li> <li>(5) Power of guardian to assign appropriation made for ward by probate court.</li> </ul> </li> <li>5. Rights and powers of guardians. <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) Guardian may do what.</li> <li>(3) Guardian can not do what.</li> <li>(4) Actions by guardian.</li> <li>(5) Actions against guardians.</li> </ul> </li> </ul> |
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6. Investments by guardians.
7. Sales of land.
  - (1) In general.
  - (2) Petition for.
  - (3) Notice. Publication.
  - (4) Additional bond.
  - (5) Jurisdiction and supervision of court.
  - (6) Order for.
  - (7) Manner and mode of sale.
  - (8) Validity of.
  - (9) Same—Indian lands.
  - (10) Resale.
  - (11) Confirmation.
  - (12) Purchaser and his rights.
8. Setting aside.
  - (1) In general.
  - (2) Fraud.
  - (3) Other considerations in equity.
  - (4) Guardian's sale to himself. Void sales.
  - (5) Return of consideration.
9. Collateral attack.
  - (1) In general.
  - (2) Definitions.
  - (3) When not effective.
  - (4) Void proceedings are subject to.
10. Lease and demise of ward's property.
  - (1) In general.
  - (2) Lease of Indian allotments.
  - (3) Same. Controlling statutes.
  - (4) Same. Approval of Secretary of Interior.
  - (5) Same. Approval and order of court.
  - (6) Validity of lease beyond ward's minority.
  - (7) Collateral attack.
11. Mortgage of ward's property.
  - (1) Petition as foundation of jurisdiction.
  - (2) Authority to mortgage.
  - (3) Validity of order and mortgage.
  - (4) Revival and foreclosure of former mortgage.
  - (5) Collateral attack.
12. Non-resident guardians and wards.
13. Accounting and settlement.
  - (1) In general.
  - (2) Inventory and report.
  - (3) Duty to account.
  - (4) Jurisdiction of courts.
  - (5) Exceptions to account.
  - (6) Admissibility of evidence.
  - (7) Proper charges against guardian. Interest.
  - (8) Credits allowable to guardian.
  - (9) What is not to be allowed. Compensation. Attorneys' fees.
  - (10) Death of ward before settlement.
  - (11) Conclusiveness. Attacking settlement.
  - (12) Discharge of guardian.
  - (13) Death of guardian before settlement.
14. Collateral attack.
  - (1) What constitutes.
  - (2) What may be so attacked.
  - (3) What is not subject to.
15. Jurisdiction of courts.
  - (1) In general.
  - (2) County courts of Oklahoma.
16. Jurisdiction of equity.
17. Liability of guardians.
  - (1) For investments made without order of court.
  - (2) Protection of order of court.
  - (3) Liability of guardian. In general.
  - (4) Same. For funds deposited in bank.
  - (5) Validity of acts of guardian.
18. Embezzlement by guardian.
19. Resignation of guardian.
20. Removal of guardian.
21. Rights and liabilities of ward.
  - (1) In general.
  - (2) Actions by ward. In general.
  - (3) Same. Against purchaser.
  - (4) Same. For fraud.
  - (5) Same. For misuse of his money.
  - (6) Same. To recover money.
  - (7) Same. Against estate of deceased guardian.
  - (8) Actions against ward.
  - (9) No disaffirmance of parol partition when.
22. Bond of guardian, and liability thereon.
  - (1) Failure to give a bond.
  - (2) Purpose of bond.
  - (3) Breach of bond and control over it.
  - (4) New bond.
  - (5) Action on bond. In general.
  - (6) Same. Pleading. Evidence. Jurisdiction.
  - (7) Same. Settlement as basis for. Appeal.
  - (8) Liability of sureties. In general.



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| (9) Same. Validity of bond.                           | (16) Limitations of actions. |
| (10) Same. On sale bond.                              | 23. Limitations of actions.  |
| (11) Same. On bond of former guardian.                | 24. Appeal.                  |
| (12) Same. Release from liability.                    | (1) In general.              |
| (13) Defense to action. In general.                   | (2) Appealable orders.       |
| (14) Same. Laches.                                    | (3) Findings.                |
| (15) Same. Conclusiveness of decree as to accounting. | (4) Effect of, as stay.      |
|   | (5) Dismissal.               |
|   | (6) Record. Presumption.     |
|   | (7) Affirmance. Reversal.    |
|   | (8) Review.                  |

**§ 150. Examination of persons suspected of defrauding wards or of concealing property.**

Upon complaint made by any guardian, ward, creditor, or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled, smuggled, or fraudulently disposed of, any of the money, goods, or effects, or an instrument in writing belonging to the ward or to his estate, the superior court may cite such suspected person to appear before such court, and may examine and proceed against him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing, embezzling, smuggling, or fraudulently disposing of the effects of a decedent—*Kerr's Cyc. Code Civ. Proc.*, § 1800.

**ANALOGOUS AND IDENTICAL STATUTES,**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1742.  
 Arizona\*—Revised Statutes of 1913, paragraph 1170.  
 Colorado—Mills's Statutes of 1912, section 8042.  
 Idaho—Compiled Statutes of 1919, section 7892.  
 Montana—Revised Codes of 1907, section 7807.  
 Nevada—Revised Laws of 1912, sections 6181, 6186.  
 North Dakota—Compiled Laws of 1913, section 8919.  
 Oklahoma—Revised Laws of 1910, section 6577.  
 Oregon—Lord's Oregon Laws, section 1335.  
 South Dakota—Compiled Laws of 1913, section 6032.  
 Utah—Compiled Laws of 1907, section 4019.  
 Wyoming—Compiled Statutes of 1910, section 5780.

**§ 151. Removal and resignation of guardian, and surrender of estate.**

When a guardian, appointed either by the testator or a court, becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the superior court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court may appoint another in the place of the guardian who resigned or was removed.—*Kerr's Cyc. Code Civ. Proc.*, § 1801.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1738.
- Arizona\*—Revised Statutes of 1913, paragraph 1171.
- Colorado—Mills's Statutes of 1912, sections 7918, 7920, 7921.
- Idaho—Compiled Statutes of 1919, section 7893.
- Kansas—General Statutes of 1915, sections 5061, 6126.
- Montana\*—Revised Codes of 1907, section 7808.
- Nevada—Revised Laws of 1912, sections 6181, 6186.
- New Mexico—Statutes of 1915, section 2556.
- North Dakota—Compiled Laws of 1913, section 8700.
- Oklahoma\*—Revised Laws of 1910, section 6578.
- Oregon—Lord's Oregon Laws, section 1331.
- South Dakota\*—Compiled Laws of 1913, section 6033.
- Utah—Compiled Laws of 1907, sections 3837, 3838, 3991.
- Wyoming—Compiled Statutes of 1910, section 5781.

**§ 152. Guardianship, how terminated.**

The marriage of a minor ward terminates the guardianship of the person of such ward, but not the estate; and the guardian of an insane or other person may be discharged by the court, when it appears on the application of the ward or otherwise, that the guardianship is

no longer necessary.—*Kerr's Cyc. Code Civ. Proc.*, § 1802.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1739.  
 Arizona\*—Revised Statutes of 1913, paragraph 1172.  
 Idaho—Compiled Statutes of 1919, section 7894.  
 Montana\*—Revised Codes of 1907, section 7809.  
 Nevada—Revised Laws of 1912, section 6182.  
 North Dakota\*—Compiled Laws of 1913, section 8920.  
 Oklahoma—Revised Laws of 1910, section 6579.  
 Oregon—Lord's Oregon Laws, section 1332.  
 South Dakota—Compiled Laws of 1913, section 6034.  
 Utah—Compiled Laws of 1907, sections 3992, 3996.  
 Wyoming\*—Compiled Statutes of 1910, section 5782.

#### § 153. New bond, when required.

The court may require a new bond to be given by a guardian whenever such court deems it necessary, and may discharge the existing sureties from further liability, after due notice given as such court may direct, when it shall appear that no injury can result therefrom to those interested in the estate.—*Kerr's Cyc. Code Civ. Proc.*, § 1803.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1740.  
 Arizona\*—Revised Statutes of 1913, paragraph 1173.  
 Colorado—Mills's Statutes of 1912, section 7925.  
 Hawaii—Revised Laws of 1915, section 3040.  
 Idaho\*—Compiled Statutes of 1919, section 7895.  
 Kansas—General Statutes of 1915, section 5062.  
 Montana—Revised Codes of 1907, section 7810.  
 Nevada—Revised Laws of 1912, section 6183.  
 New Mexico—Statutes of 1915, section 2564.  
 Oklahoma\*—Revised Laws of 1910, section 6580.  
 Oregon—Lord's Oregon Laws, section 1333.  
 South Dakota\*—Compiled Laws of 1913, section 6035.  
 Utah—Compiled Laws of 1907, sections 3909XI, 3991.  
 Washington—Laws of 1917, chapter 156, page 701, section 202.  
 Wyoming\*—Compiled Statutes of 1910, section 5783.

**§ 154. Guardian's bond to be filed. Action on.**

Every bond given by a guardian must be filed and preserved in the office of the clerk of the superior court of the county, and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate.—*Kerr's Cyc. Code Civ. Proc.*, § 1804.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1770.  
 Arizona\*—Revised Statutes of 1913, paragraph 1174.  
 Hawaii—Revised Laws of 1915, section 3044.  
 Idaho\*—Compiled Statutes of 1919, section 7896.  
 Montana\*—Revised Codes of 1907, section 7811.  
 Nevada—Revised Laws of 1912, section 6184.  
 North Dakota\*—Compiled Laws of 1913, section 8921.  
 Oklahoma\*—Revised Laws of 1910, section 6581.  
 South Dakota\*—Compiled Laws of 1913, section 6036.  
 Washington—Laws of 1917, chapter 156, page 700, section 203.  
 Wyoming\*—Compiled Statutes of 1910, section 5784.

**§ 155. Limitation of actions on guardian's bond.**

No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three years from the discharge or removal of the of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.—*Kerr's Cyc. Code Civ. Proc.*, § 1805.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1771.  
 Arizona\*—Revised Statutes of 1913, paragraph 1175.  
 Hawaii—Revised Laws of 1915, section 3045.  
 Idaho\*—Compiled Statutes of 1919, section 7897.  
 Montana\*—Revised Codes of 1907, section 7812.  
 Nevada—Revised Laws of 1912, section 6185.  
 North Dakota\*—Compiled Laws of 1913, section 8922.  
 Oklahoma\*—Revised Laws of 1910, section 6582.  
 Oregon—Lord's Oregon Laws, section 1334.

South Dakota\*—Compiled Laws of 1913, section 6037.

Wyoming—Compiled Statutes of 1910, section 5785.

**§ 156. Limitation of actions for the recovery of property sold.**

No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.—*Kerr's Cyc. Code Civ. Proc.*, § 1806.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1768.

Arizona\*—Revised Statutes of 1913, paragraph 1176.

Colorado—Mills's Statutes of 1912, section 7988.

Hawaii—Revised Laws of 1915, section 3063.

Idaho\*—Compiled Statutes of 1919, section 7898.

Montana\*—Revised Codes of 1907, section 7813.

North Dakota\*—Compiled Laws of 1913, section 8923.

Oklahoma\*—Revised Laws of 1910, section 6583.

Oregon—Lord's Oregon Laws, section 1364.

South Dakota\*—Compiled Laws of 1913, section 6038.

Wyoming—Compiled Statutes of 1910, section 5786.

**§ 157. More than one guardian may be appointed.**

The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, each of whom must give a separate bond, and be governed and liable in all respects as a sole guardian.—*Kerr's Cyc. Code Civ. Proc.*, § 1807.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1177.

Idaho—Compiled Statutes of 1919, section 7899.

Montana—Revised Codes of 1907, section 7814.

Nevada—Revised Laws of 1912, section 6192.

North Dakota—Compiled Laws of 1913, section 8924.

Oklahoma—Revised Laws of 1910, section 6584.

South Dakota\*—Compiled Laws of 1913, section 6039.

Utah—Compiled Laws of 1907, section 3987.

Wyoming\*—Compiled Statutes of 1910, section 5787.

**§ 158. Order appointing guardian, how entered.**

Any order appointing a guardian, must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the superior court, apply to proceedings under this chapter.—*Kerr's Cyc. Code Civ. Proc.*, § 1808.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 1178.

Idaho—Compiled Statutes of 1919, section 7900.

Montana—Revised Codes of 1907, section 7815.

Oklahoma—Revised Laws of 1910, section 6585.

South Dakota—Compiled Laws of 1913, section 6040.

Utah—Compiled Laws of 1907, section 3993.

Wyoming\*—Compiled Statutes of 1910, section 5788.

**§ 159. What provisions of code apply to guardians.**

The provisions of sections ten hundred and fifty-six and ten hundred and fifty-seven are hereby declared to apply to guardians appointed by the court, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds.—*Kerr's Cyc. Code Civ. Proc.*, § 1809.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 1179.

Idaho—Compiled Statutes of 1919, section 7901.

Montana—Revised Codes of 1907, section 7816.

Washington—Laws of 1917, chapter 156, page 701, section 204.

**§ 160. Decree that conveyance be made for incompetent.**

When a person who is bound by a contract in writing to convey any real estate shall afterwards and before making the conveyance become and be adjudged to be an incompetent person, the court may make a decree authorizing and directing his guardian to convey such real estate to the person entitled thereto. Such decree

may be made under the provisions of sections fifteen hundred and ninety-seven to sixteen hundred and seven, both inclusive, of this code, all of which provisions are hereby incorporated in this section; the word incompetent being substituted for the word deceased or decedent and the word guardian being substituted for the words administrator or executor, respectively, wherever said words occur.—*Kerr's Cyc. Code Civ. Proc.*, § 1810.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Arizona—Revised Statutes of 1912, paragraph 1180.

Washington—Laws of 1917, chapter 156, page 695, section 188.

**§ 160.<sup>1</sup> Conveyance by guardian.**

When a person who is bound by contract in writing to convey any real estate, or to transfer any personal property, dies before making conveyance or transfer, and in all cases when such decedent, if living, might be compelled to make such conveyance or transfer, the court, having jurisdiction of the guardianship proceedings of such minor, may make a decree authorizing and directing the guardian of any minor, who has succeeded by distribution to the estate of such deceased person, to convey or transfer such real estate or personal property to the person entitled thereto.—*Kerr's Cyc. Code Civ. Proc.*, § 1810a.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

New Mexico—Statutes of 1915, section 4773.

**§ 160.<sup>2</sup> Attorneys' fees against minor fixed by court.**

All contracts for attorneys' fees made by or for the benefit of minors shall be void, and whenever a judgment shall be recovered by or on behalf of a minor, the attorneys' fees chargeable against said minor shall be fixed by the court in which said judgment is rendered, and if said judgment is for money, and there is no general guardian of said minor, one shall be appointed by the

court, and the entire amount of the judgment shall be paid to and shall be cared for by such general guardian, under the control of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1810b.

## GUARDIAN AND WARD.

1. Appointment of guardians.
  - (1) Jurisdiction of court.
  - (2) Right to appointment.
  - (3) Necessity of petition and notice.
  - (4) Circumstances for consideration.
  - (5) Bond. Estoppel.
  - (6) Appointment here, notwithstanding foreign guardian.
  - (7) Evidence of appointment.
  - (8) Validity of appointment.
  - (9) Certiorari.
  - (10) Res judicata.
  - (11) Collateral attack.
2. Guardianship of Indians.
  - (1) In general.
  - (2) Indians as wards of the government.
  - (3) Enrollment, allotment, and alienation.
  - (4) Acts of congress.
  - (5) Disposition by will as an alienation.
  - (6) Restrictions upon alienation.
  - (7) Same. Extension of period of restriction.
  - (8) Same. Approval of Secretary of Interior.
  - (9) Same. Approval and jurisdiction of court.
  - (10) Removal of restrictions.
  - (11) Marketable title.
  - (12) Probate attorney.
3. Control of property, support, maintenance, and custody of ward.
  - (1) Control of property.
  - (2) Support and maintenance.
  - (3) Contract for support.
  - (4) Support of abandoned child.
  - (5) Custody of ward. Access.
4. Duties and powers of guardians.
  - (1) In general.
  - (2) Power of guardian as to contracts.
  - (3) Same. Contracts with Indians.
  - (4) Same. Sale of minor's interest not valid unless made how.
  - (5) Power of guardian to assign appropriation made for ward by probate court.
5. Rights and powers of guardians.
  - (1) In general.
  - (2) Guardian may do what.
  - (3) Guardian can not do what.
  - (4) Actions by guardian.
  - (5) Actions against guardians.
6. Investments by guardians.
7. Sales of land.
  - (1) In general.
  - (2) Petition for.
  - (3) Notice. Publication.
  - (4) Additional bond.
  - (5) Jurisdiction and supervision of court.
  - (6) Order for.
  - (7) Manner and mode of sale.
  - (8) Validity of.
  - (9) Same—Indian lands.
  - (10) Resale.
  - (11) Confirmation.
  - (12) Purchaser and his rights.
8. Setting aside.
  - (1) In general.
  - (2) Fraud.
  - (3) Other considerations in equity.
  - (4) Guardian's sale to himself. Void sales.
  - (5) Return of consideration.
9. Collateral attack.
  - (1) In general.
  - (2) Definitions.
  - (3) When not effective.
  - (4) Void proceedings are subject to.
10. Lease and demise of ward's property.
  - (1) In general.
  - (2) Lease of Indian allotments.
  - (3) Same. Controlling statutes.
  - (4) Same. Approval of Secretary of Interior.
  - (5) Same. Approval and order of court.
  - (6) Validity of lease beyond ward's minority.
  - (7) Collateral attack.



11. Mortgage of ward's property.
  - (1) Petition as foundation of jurisdiction.
  - (2) Authority to mortgage.
  - (3) Validity of order and mortgage.
  - (4) Revival and foreclosure of former mortgage.
  - (5) Collateral attack.
12. Non-resident guardians and wards.
13. Accounting and settlement.
  - (1) In general.
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  - (3) Duty to account.
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  - (5) Exceptions to account.
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  - (9) What is not to be allowed. Compensation. Attorneys' fees.
  - (10) Death of ward before settlement.
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  - (12) Discharge of guardian.
  - (13) Death of guardian before settlement.
14. Collateral attack.
  - (1) What constitutes.
  - (2) What may be so attacked.
  - (3) What is not subject to.
15. Jurisdiction of courts.
  - (1) In general.
  - (2) County courts of Oklahoma.
16. Jurisdiction of equity.
17. Liability of guardians.
  - (1) For investments made without order of court.
  - (2) Protection of order of court.
  - (3) Liability of guardian. In general.
  - (4) Same. For funds deposited in bank.
  - (5) Validity of acts of guardian.
18. Embezzlement by guardian.
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  - (1) In general.
  - (2) Actions by ward. In general.
  - (3) Same. Against purchaser.
  - (4) Same. For fraud.
  - (5) Same. For misuse of his money.
  - (6) Same. To recover moneys.
  - (7) Same. Against estate of deceased guardian.
  - (8) Actions against ward.
  - (9) No disaffirmance of parol partition when.
22. Bond of guardian, and liability thereon.
  - (1) Failure to give a bond.
  - (2) Purpose of bond.
  - (3) Breach of bond and control over it.
  - (4) New bond.
  - (5) Action on bond. In general.
  - (6) Same. Pleading. Evidence. Jurisdiction.
  - (7) Same. Settlement as basis for. Appeal.
  - (8) Liability of sureties. In general.
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  - (11) Same. On bond of former guardian.
  - (12) Same. Release from liability.
  - (13) Defense to action. In general.
  - (14) Same. Laches.
  - (15) Same. Conclusiveness of decree as to accounting.
  - (16) Limitations of actions.
23. Limitations of actions.
24. Appeal.
  - (1) In general.
  - (2) Appealable orders.
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  - (5) Dismissal.
  - (6) Record. Presumption.
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  - (8) Review.

### 1. Appointment of guardians.

(1) Jurisdiction of court.—The appointment of guardians for the persons and estates of minors is an exercise of jurisdiction pertaining to the probate courts.—*Monastes v. Catlin*, 6 Or. 119. The record must affirmatively show, with respect to the appointment of a guardian, that

every act essential to give jurisdiction to the court was performed.—*Seaverns v. Gerke*, 3 Saw. 353; Fed. Cas., No. 12,595. An application for letters of guardianship should be made in the county where the proposed ward resides.—*Estate of Taylor*, 131 Cal. 180, 63 Pac. 180. The superior court of the county of which the minor is an inhabitant or resident has jurisdiction to appoint a guardian; and the minor is a resident of the county wherein he has resided for more than three years, and has not, during that period, had any other home, nor been absent or away from said county.—*In re Reynor*, 74 Cal. 421, 424, 16 Pac. 229. A probate court has general jurisdiction as to the care of the estates of minors and the matter of appointing a guardian for a minor and authorizing the transfer of property through a guardian being within its jurisdiction, its decision in respect to them is binding and not open to collateral attack.—*Brack v. Morris*, 90 Kan. 64, 132 Pac. 1185. In the appointment of guardians, the county (probate) courts are vested with a sound legal discretion and their judgments in such cases will not be overruled unless it is apparent that there has been an abuse of such discretion.—*Brigman v. Cheney*, 27 Okla. 510, 112 Pac. 993. It is not an abuse of discretion of the probate court to refuse an application to adopt a minor and grant one for guardianship when both applications are made by relatives of the minor and both applicants are equally well qualified to take charge of and care for it.—*In re Wells*, 60 Wash. 518, 111 Pac. 779. A change of residence to another county on the part of a ward in the interim between the removal of the former guardian and the appointment of a new one, does not operate to oust the county court of the county of the ward's former residence of its jurisdiction.—*Crosbie v. Brewer* (Okla.), 158 Pac. 388, 392.

#### REFERENCES.

That letters of guardianship may be granted by a judge at chambers. See *Kerr's Cal. Cyc. Civ. Code*, § 166.

(2) Right to appointment.—In all cases where the appointment of a guardian shall appear necessary or convenient, the father shall be first in legal right; and if the father be deceased, the mother, while unmarried, if they be competent to transact their own business, and are not otherwise unsuitable; and if another be appointed, he is not entitled to the personal custody and tuition of the ward, so long as the latter has a father or mother living, who is competent to care for and educate him, and is not otherwise unsuitable.—*Lord v. Hough*, 37 Cal. 657, 668. The appointment of a guardian is therefore given first to the father, second to the mother, and lastly to the probate court.—*Lord v. Hough*, 37 Cal. 657, 669. The order of court appointing a father as guardian of his infant child may contain directions concerning the custody of the person of the ward.—*In re Linden*, Myr. Prob. 215. Where each of two persons filed a petition for letters of guardianship of the person of a minor, and no answer is filed to either petition, there are no issues made which demand findings of fact.—*In re Lewis*, 137

Cal. 682, 70 Pac. 926. The question as to which of two petitioners shall be appointed guardian over the person of a minor child is essentially a question of fact for the trial court, and if that court has decided it, the order will not be set aside for lack of evidence, where there was some substantial evidence to support the appointment.—*In re Lewis*, 137 Cal. 682, 70 Pac. 926. The parent is entitled to the guardianship of his minor child, if he is competent to transact his own business, and is not unsuitable as a guardian.—*Andrino v. Yates*, 12 Ida. 618, 87 Pac. 787. A parent is entitled to the guardianship of his child under the age of fourteen years, if he is a fit, proper, and competent person, in preference to any other person; nor is the right of the father, he being competent, to have the custody and control of his child at all affected by the finding of the court relative to the health of the child, and the better opportunity he would have for fresh air and exercise at the home of his grandmother, than at the residence of his father.—*In re Salter*, 142 Cal. 412, 76 Pac. 51, 53. As to evidence which is not sufficient to show that the father of a child under fourteen years of age is not a fit, or proper, or competent person to have the care, custody, or control of his own child, see *In re Galleher*, 2 Cal. App. 364, 84 Pac. 352, 354. It is no objection to the appointment of a guardian for a minor that he would inherit a portion of the ward's estate in the event of the latter's death without issue.—*In re Masterson's Estate*, 45 Wash. 48, 122 Am. St. Rep. 886, 87 Pac. 1047, 1048. Under section 1751, California Code of Civil Procedure, it is the duty of the court to appoint the father or mother of a minor child under the age of 14 years as its guardian, if such parent is found by the court competent for the office; and inasmuch as the presumption of law is in favor of competency, the section is to be construed as if it read that the father or mother is to be appointed if not found by the court incompetent.—*Guardianship of Forrester*, 162 Cal. 493, 123 Pac. 283. The right to appoint a guardian of a minor by will or deed is statutory, and under section 241 of the California Civil Code, a guardian of a legitimate child may be so appointed "by the father with the written consent of the mother, or by either parent if the other be dead or incapable of consent."—*Matter of Allen*, 162 Cal. 625, 124 Pac. 237. Parents are the natural guardians of their children, and can not be deprived of their right to their care, custody, society, and services, except by a proceeding in which it is shown that they are unfit or unwilling or unable to perform their parental duties.—*Matter of Hart*, 21 Cal. App. 30, 130 Pac. 704. Under the provisions of section 7846, Comp. Stat. of Idaho, 1919, either the father or mother of a minor being respectively competent to transact his or her own business and not otherwise unsuitable is entitled to the guardianship of the minor child.—*State v. Beslin*, 19 Ida. 185, 112 Pac. 1053. Under the provisions of section 7846, Comp. Stat. of Idaho, 1919, the surviving parent who is competent to transact his own business, and not unsuitable otherwise, is entitled to the guardianship of his minor children, and a finding that a father is a man of intemperate habits and lacking in integrity does not disentitle him to the guardian-

ship of his minor child.—*In re Crocheron's Estate*, 16 Ida. 441, 33 L. R. A. (N. S.) 868, 101 Pac. 741. Under the California statute, the mother has a primary right to be appointed in absence of proof that she is not fit to act.—*In re Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444. Forfeiture of the parent's right does not arise from mere temporary absence or neglect of parental duty.—*In re Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444. Parents can not be deprived of the right to the custody, society, and services of their children, except by proceedings in which it is shown that they are unfit, unwilling, or unable to perform their parental duties.—*Ex parte Hart*, 21 Cal. App. 30, 130 Pac. 704. A judgment taking a young child from the custody of its aunt and giving it temporarily to its dissolute, immoral, and neglectful mother for the purpose of reforming her, is not countenanced by the law.—*In re Lee*, 165 Cal. 279, 45 L. R. A. (N. S.) 91, 131 Pac. 749. The parent of a minor has no property right in his or her offspring, and the privilege of the parent to have awarded to it the custody of the child is only a matter of right when the parent is found to be reasonably fitted to become such guardian.—*Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018, 1019. On a contest for letters of guardianship of a minor, when neither of the applicants has any preferential right to the appointment, the court is authorized, under section 246 of the Civil Code of California, to exercise its discretion in appointing one or the other of the contending parties, having due regard for the considerations set forth in that section.—*Matter of Allen*, 162 Cal. 625, 124 Pac. 237. Under section 1751 of the Code of Civil Procedure of California, it is the duty of the court to appoint the father or mother of a minor child under the age of fourteen years as its guardian, if such parent is found by the court competent to discharge the duties of guardianship; and inasmuch as the presumption of law is in favor of competency, the section is to be construed as if it read that the father or mother is to be appointed if not found by the court incompetent.—*Matter of Forrester*, 162 Cal. 493, 123 Pac. 283. Where the father is competent, he is entitled to letters of guardianship in preference to the grandmother, even though the court may find that the child's health and welfare would be promoted by granting guardianship to the grandmother.—*Matter of Forrester*, 162 Cal. 493, 123 Pac. 283. Interest in property adverse to that of the ward does not necessarily disqualify one from being a personal guardian, where the guardianship of the estate is awarded to another.—*In re Bedford's Estate*, 158 Cal. 145, 110 Pac. 302.

## REFERENCES.

That a corporation may act as the guardian of estates, see *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1348. Right of mother or reputed father to guardianship of illegitimate child.—See note 65 L. R. A. 689-697:

(3) Necessity of petition and notice.—The appointment of a guardian without giving any notice whatever is void.—*Seaverns v. Gerke*, 3 Saw. 353, Fed. Cas., No. 12,595. The appointment of a guardian is invalid

except on proper petition filed, and after notice of the application.—*Badenhoof v. Johnson*, 11 Nev. 87. But if parties have notice of what is in progress before the court, they may waive any formal notice by appearance and consent. Thus if all persons who are entitled to notice as a prerequisite to a valid appointment of a guardian for a minor under fourteen years of age, appear and consent to the appointment, no formal notice to them is necessary.—*Smith v. Biscailuz*, 83 Cal. 344, 353, 21 Pac. 15, 23 Pac. 314. So in proceedings for the appointment of a guardian, where the father has custody of the minor, and petitions to be appointed guardian, notice to him of the proceedings is not necessary.—*Asher v. Yorba*, 125 Cal. 513, 58 Pac. 137, 138. Under a statute which requires the court, before appointing a guardian, to cause such notice as is deemed reasonable to be given to the person having care of the minor, and to such relatives as the court may deem proper, the court has authority to give notice by posting for ten days in three public places, and such notice under direction of the court is sufficient. The kind or character of the notice to be given is a matter for the judge to determine, and where personal notice is not absolutely required, a notice by posting is sufficient.—*Asher v. Yorba*, 125 Cal. 513, 58 Pac. 137, 138. It has long been the settled practice to determine, in guardianship proceedings, questions as to the fitness and competency of parents to have the custody of their children; but notice to a parent of the minor of the appointment of a guardian is not in all cases essential to the jurisdiction of the court to appoint a guardian. In many cases where the interests of the minor make it essential that some one should at once be given authority to act as the legal custodian, it would be practically impossible to notify the parents, owing to ignorance of facts as to parentage, or as to the whereabouts of its parents. Undoubtedly, a parent should be notified, where possible, of proceedings, the effect of which may be to terminate his parental authority; and, undoubtedly, where such notice is not required to be given, a parent would be entitled, upon seasonable application, to be heard upon the question as to whether the appointment of another as the guardian of his child, without his knowledge, should not be set aside, that he might be heard upon the question of the necessity of appointing such other as guardian. But, under a statute which requires that notice shall be given to the person having the care of the minor, and which requires that notice is to be given to those relatives of the minor residing in the county, such "as the court may deem proper," the only persons to be notified are those having the care of the minor, and such relatives residing in the county "as the court may deem proper."—*In re Lundberg*, 143 Cal. 402, 77 Pac. 156, 158. The appointment of a guardian without notice to a parent does not deprive the parent of a valuable right without due process of law. If actual notice to the parent were a prerequisite in such a proceeding, no appointment, in many cases, could be legally made, as he may have abandoned his child, and his whereabouts may be unknown. The right of the parent is of such a nature that it must yield to such reasonable

regulations, after due notice, as the legislature may prescribe.—In *re* Lundberg, 143 Cal. 402, 77 Pac. 156, 159. Proceedings affecting infants and the appointment of guardians are special in their nature, and must be had in accordance with the procedure outlined by the code. The superior court, before it is authorized to provide for a change in the temporary custody of the minor, must have had a proper motion presented to it and some evidence of the fact that the best interests of the child would be imperiled unless such order was made.—*Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018, 1019. The county court in probate is a court of general jurisdiction, and its records entitled to have accorded them the effect and legal presumption in favor of the appointment of a guardian, and even though the record fails to show that the statutory notice of such appointment was given to the person having the care of the minor, or to such relative residing in the county as the judge might have deemed proper, it will be presumed in favor of the validity of the appointment that the judge heard evidence, from which it appeared that the minor, who was 18 years of age, was not in charge of any one and had no relatives in the county, and that the notice could not be given.—*Baker v. Cureton*, 49 Okla. 15, 150 Pac. 1090, 1092. Upon the death, resignation or removal of a guardian, the county judge can appoint a new guardian forthwith, without giving the notices required in the first instance.—*Crosbie v. Brewer* (Okla.), 158 Pac. 388, 394.

#### REFERENCES.

Authority of guardian to make grazing lease of ward's land. See note, post, on mortgages and leases, following § 622.

(4) *Circumstances for consideration.*—In considering the propriety of appointing a guardian, the parental request is entitled to great weight, and ought to prevail, unless some good reason to the contrary is shown.—*Badenhoof v. Johnson*, 11 Nev. 87. The main consideration in appointing a guardian for the person and estate of an infant is the welfare of the child.—*Willet v. Warren*, 34 Wash. 647, 76 Pac. 273; *In re Lundberg*, 123 Cal. 143, 402, 77 Pac. 156; *Guardianship of Brown*, 11 Haw. 679, 681. The child's own choice, though it is not of a choosing age in law, is a circumstance for consideration; and the ties of natural affection are not to be disregarded, although it does not always follow that these ties exist because of kinship or consanguinity.—*Willet v. Warren*, 34 Wash. 647, 76 Pac. 273, 274. The natural rights of the father to the care, control, and custody of his minor children can not, and ought not, to be denied or disturbed, in the absence of good and substantial reasons; reasons made imperative by the necessities of such children, and the interest in and the duty owing to them by the state. But where it has been adjudicated by a court of competent jurisdiction that a father has recently, for three years, neglected to support his offspring, and has thereby caused his wife to get a divorce, such husband is not in a good attitude to come into court and ask for their custody, control, and guardianship. He should not be allowed

the guardianship of his children until, by a substantial period of probation, he is shown to have amended his character and disposition regarding them, and to have acquired those worthy and substantial qualities of heart and mind that characterize the reputable man and considerate father.—*Russner v. McMillan*, 37 Wash. 416, 79 Pac. 988, 989. So, where it is possible, the courts will give some consideration to keeping the children with the surviving members of the family to which they belong; but will give no weight to evidence of religious opinions, in such a proceeding, though the difficulties and disagreements concerning the child arose from differences in religious matters.—*Jones v. Bowman*, 13 Wyo. 79, 67 L. R. A. 860, 77 Pac. 439, 440, 442. On an application for guardianship, the court will respect the best interests of the child, concerning its temporal, mental, and moral welfare, particularly where both parents of the minor are dead.—*In re Dellow's Estate*, 1 Cal. App. 529, 82 Pac. 558, 559. A written request by the father of minor children, that a designated person be appointed their guardian, does not have the effect, after his death, of changing their domicile, or of empowering any probate court, foreign to their domicile, to appoint a guardian for them.—*Modern Woodmen v. Hester*, 66 Kan. 129, 71 Pac. 279. For circumstances under which it is proper for the court to refuse to appoint an intemperate father of the child as its guardian, and to appoint the child's grandmother, see *Russner v. McMillan*, 37 Wash. 416, 79 Pac. 988. The right of a mother or grandmother to be appointed as guardian of a minor child, in case of the father's decease, is devested by a decree of adoption consented to by the natural mother of the child.—*In re Masterson's Estate*, 45 Wash. 48, 122 Am. St. Rep. 886, 87 Pac. 1047. In a proceeding for the guardianship of the person of a minor, the determination from the evidence concerning the character of the petitioning father and other facts bearing on the condition and welfare of the child, as to whether or not he should have the guardianship, is a question largely in the discretion of the court below. In the present case the evidence is deemed sufficient to support the conclusion of the lower court that the father was not a fit person to have the guardianship of the person of a female child of about six years of age.—*Guardianship of Bedford*, 158 Cal. 145, 110 Pac. 302. When there was nothing to impeach the good faith of a guardian except the statement that he was a client of some of the attorneys in the proceedings that relation would not disqualify him from serving as guardian unless the retainer was in a matter relating to the subject in dispute.—*Anderson v. McClellan*, 54 Or. 206, 102 Pac. 1016. Determination from evidence of father's character and other facts bearing on condition and welfare of child whether he shall have guardianship of her person, is discretionary with trial court.—*In re Bedford's Estate*, 158 Cal. 145, 110 Pac. 302. Proof of judgment of divorce against applicant on ground of desertion and awarding custody of child to mother, may be considered, as also may be prior consent of applicant to adoption of infant child by grandmother.—*In re Bed-*

ford's Estate, 158 Cal. 145, 110 Pac. 302. General statements by witnesses manifestly unfriendly, that child was always filthy and that mother did not keep clean house, are not sufficient to deprive her of guardianship.—*In re Lindner's Estate*, 13 Cal. App. 208, 109 Pac. 101. To say that the best interests of a child shall be imperiled before the action indicated by section 1747 of the Code of Civil Procedure of California, providing for the temporary custody of such minor until a hearing can be had on the petition, can be taken, amounts to no more than to say that whenever it appears to be for the best interest of the minor such change of custody may be ordered.—*Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018, 1019. Although section 1750 of the Code of Civil Procedure of California provides that a child under the age of fourteen must have his guardian appointed by the court, it does not follow that every child under that age is of "tender years" within the meaning of section 246 of the Civil Code of that state. The sex is to be considered as is also the physical development. There can not be any fixed and certain age of minority, which, in all cases and for all purposes, can be said to constitute a child of "tender years."—*Russell v. Russell*, 20 Cal. App. 457, 129 Pac. 467. The fact that the property of a person for whom a guardian is asked on the ground of incapacity under the provisions of section 1763, et seq., Code of Civil Procedure of California, might be made more productive under the management of a guardian than under that of the person himself, and that the contending claims of the various children of such person could in that manner be better harmonized by keeping the estate intact in his lifetime, however desirable in themselves, do not justify the appointment of a guardian under that section.—*In re Watson (Watson v. Watson)*, 176 Cal. 342, 345, 168 Pac. 341.

(5) **Bond. Estoppel.**—One who has been appointed, by order of court, a guardian of the property of minor children does not become a guardian until he gives the bond required by law.—*Murphy v. Superior Court*, 84 Cal. 592, 597, 24 Pac. 310. One who has applied for letters of guardianship, and has acted as guardian for minor children, is not estopped to deny that he is such guardian, because of his neglect to give a bond required by the statute, where he has not received any property belonging to the minors, as their guardian, or by virtue of his appointment.—*Murphy v. Superior Court*, 84 Cal. 592, 597, 24 Pac. 310.

#### REFERENCES.

Necessity of bond by guardian to make his acts valid.—See note 33 L. R. A. 759-765. Power of surety company to act as guardian without bond.—See note 48 L. R. A. 589. Bond of guardian, and liability thereon.—See subd. 19, post.

(6) **Appointment here, notwithstanding foreign guardian.**—The claim of a petitioner for the custody of a child can not rest on a supposed rightful authority to control his person in this state by virtue of his



appointment as guardian in another state. He can not assert his tutorial power de jure in our courts, or within our territory. Hence a guardian, appointed by virtue of the statutes of another state, can not exercise here any authority, either over the person or property of his ward. His rights and powers are strictly local, and are circumscribed by the jurisdiction of the government which clothed him with the office.—*Jones v. Bowman*, 13 Wyo. 79, 67 L. R. A. 860, 77 Pac. 439, 442. Hence the appointment of a guardian for a minor child, by the probate court of another state, wherein the parent was domiciled at the time of his death, and who had custody of such child at the time of his death, will not prevent the courts of this state, if the child has been subsequently brought here, from appointing a guardian for it.—*Jones v. Bowman*, 13 Wyo. 79, 67 L. R. A. 860, 77 Pac. 439, 442.

(7) Evidence of appointment.—Letters of guardianship are competent evidence of the appointment of the person named therein as guardian.—*Lyons v. Fulsom*, 54 Okla. 84, 153 Pac. 868. An appointment of a guardian in another state may, for the purpose of securing an appointment of the same guardian in this state be proven by the duly authenticated copy of the original appointment, but it is not the exclusive method of proving that such appointment had been made. Other proof admissible under the general rules of evidence may be received for that purpose.—*Brack v. Morris*, 90 Kan. 64, 132 Pac. 1186. An appointment of guardian of minors by a probate court must be made of record and the non-existence of such a record negatives any appointment.—*Harrison v. Miller*, 87 Kan. 48, 123 Pac. 854. The rule that a tenant is estopped to deny his landlord's title does not preclude the tenant from denying that a designated person was a ward's qualified guardian.—*White v. White Co.*, 4 Alaska 317, 320.

(8) Validity of appointment.—Although an order appointing a guardian may be dual, in that it also appoints the guardian administrator of an estate, it is not for that reason void as to the guardianship. Nor is it void because it is entitled "In the Matter of the Estate" of the deceased, and directing that letters of guardianship of the heirs be granted, without naming them, if they are known, as that is certain which can be made certain.—*Reed v. Ring*, 93 Cal. 96, 105, 28 Pac. 851. As a minor must be an inhabitant or resident of the county in which the appointment of a guardian is made, to give the court jurisdiction to make the appointment, it follows that the appointment of the minor's sister as guardian is improper if made in the county of the sister's residence, and not in the county of the minor's residence, after proceedings for the adoption of such child had before the superior court of another county by persons residing in such county.—*In re Taylor's Estate*, 131 Cal. 180, 63 Pac. 345. It is error to appoint a temporary guardian, where the permanent guardian is a proper and suitable person to perform all of the duties required of such temporary guardian.—*In re Barns*, 36 Wash. 130, 78 Pac. 783, 784. If the appointment of a guardian is void, all subsequent proceedings in the guardianship matter, including

sales of real property, are also void.—*Seaverns v. Gerke*, 3 Saw. 353, Fed. Cas., No. 12,595; and see *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537. As the main consideration, in determining the custody of a child, is its welfare, and as its relatives have no legal right to its custody, letters of guardianship over it will be awarded to a worthy person with whom the child has lived, and to whom it has become attached, by reason of having had the privileges of a home, school, church, and society, as against an application for letters of guardianship made by the child's aunt, who is a non-resident of the state.—*Willett v. Warren*, 34 Wash. 647, 76 Pac. 273, 274. Where guardianship proceedings have been instituted and carried to a conclusion without notice to the mother, who was living apart from her husband, although her place of residence was known, and without her knowledge, and while they were probably taken with the belief, on the part of the father's relatives, that it would be for the best interests of the child that it should remain with them, it is manifest that such proceedings were taken for the purpose of depriving the mother, without her knowledge, of the control and custody of her child, and, under a statute providing that the court may release a party from a judgment taken against him by surprise or excusable neglect, a mother may have the guardian's appointment in such a case set aside.—*In re Van Loan*, 142 Cal. 429, 76 Pac. 39, 41. Where the custody of a minor has been given to the father, an oral agreement entered into by him in California giving its custody to a third person is valid and binding on the mother, where the parents had separated by agreement.—*In re Swall*, 36 Nev. 171, Ann. Cas. 1915B, 1015, 134 Pac. 96. A document which recited that a certain person had been appointed by the probate court of a territory as guardian of a minor, and which was signed by the probate judge, who, under the law is his own clerk, had attached thereto a certificate of the same probate judge, to which the seal of the court was attached certifying that the foregoing document was a true copy of the original letters of guardianship as shown by the record of his office. Held that it was in substantial compliance with the provisions of section 368 of the Civil Code of Kansas (Gen. Stats. 1909, sec. 5963).—*Brack v. Morris*, 90 Kan. 64, 132 Pac. 1186. An attempted appointment of another without the consent of the parent is invalid.—*In re Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444. If the records of the county court in probate disclose that that court had no jurisdiction to make the appointment as guardian, the order of appointment is void on its face, and a sale of the ward's lands, though regular, and the guardian's deed thereto, in pursuance of said sale, passed no title to the land.—*Baker v. Cureton*, 49 Okla. 15, 150 Pac. 1090, 1091. A judgment for an infant plaintiff, which recites, in substance, the action of a named person in suing as next friend of the infant, cures a defective appointment of the guardian or next friend; the matter is not jurisdictional.—*Gillespie v. Collier* (Okla.), 224 Fed. 298, 300, 139 C. C. A. 534. The appointment of a curator by order of the United States Court for the Central

District of the Indian Territory, pursuant to the statute of Arkansas, applicable to the matter, when made without the voluntary of, or due notice issued by said court to, the mother of the minors, the father being dead, was void.—*In re Moore's Guardianship, Roberts v. Whiteman*, 51 Okla. 731, 152 Pac. 378. The appointment of a curator by order of the probate court in what was Indian Territory for infant minors, pursuant to Mansf. Dig., sec. 3477 (Ind. T. Ann. Stats. 1899, sec. 2373), if made without voluntary appearance or due notice issued by said court to the mother of such minors, the father being dead, is void and such order may be set aside by said court on petition of the mother.—*Wortham v. John*, 22 Okla. 562, 98 Pac. 347.

#### REFERENCES.

Desire of aged person to marry as ground for appointment of guardian.—See note 47 L. R. A. (N. S.) 475.

#### REFERENCES.

Collateral attack upon appointment of guardian.—See, post, subd. 14.

(9) *Certiorari*.—An order removing an infant from the temporary custody of its paternal grandfather, who had applied for final letters of guardianship thereof, and restoring its temporary custody to the mother, subject to restrictions, pending the final hearing of the application, that a nurse to whom its mother had committed the charge thereof be retained as such, who should take the child daily to the home of its grandparents, and that the mother should be forbidden to take the child out of the city where the court was held, was a proper order, subject to such restrictions; and there being sufficient evidence to support it, as made, it can not be annulled upon certiorari on petition of the paternal grandfather.—*Clark v. Superior Court*, 20 Cal. App. 305, 128 Pac. 1018.

(10) *Res judicata*.—Denial of petition for letters of guardianship is *res judicata* as to question of fitness of applicant.—*In re Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444. On an application by a mother to be appointed guardian of the persons and estates of her minor children, which is contested by their aunt on the ground that the mother is not a fit person to act as such guardian, a prior judgment denying an application of the aunt for guardianship of their persons, rendered in a proceeding instituted by her which was contested by the mother, in which her fitness was put in issue and determined in her favor is *res judicata* between the parties as to the mother's fitness to act as guardian of their persons, so far as her fitness might be affected by circumstances existing prior to the former hearing, but not by circumstances occurring subsequently.—*Guardianship of Snowball*, 156 Cal. 240, 104 Pac. 444.

(11) *Collateral attack*.—The appointment of a guardian can not be attacked collaterally.—*Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537, 540.

## 2. Guardianship of Indians.

(1) *In general.*—The right of Indians to land was not title, and treaties with them never regarded it as such; they had a mere possessory use for the purpose of subsistence.—*State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State v. Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041. The estates of members of the Osage tribe of Indians are governed by special legislation; the provisions of general legislation do not apply.—*Williams v. Hewitt* (Okla.), 181 Pac. 286, 287. An executor's abandonment, after making two initial payments thereon, of Indian lands listed to the estate of his testator, leaves the title so that the same vests in the widow, if the commission then lists the lands to her and she pays the remainder of the installments.—*Turner v. Turner* (Okla.), 180 Pac. 248.

(2) *Indians as wards of the government.*—Indians are wards of the government.—*Olney v. McNair* (Wash.), 177 Pac. 641. While a tribe of Indians may be designated in a treaty with them as a "nation," this is a mere recognition of them as an Indian tribe,—wards of the nation; the Indians are not within the description of an independent state or sovereign nation.—*State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State v. Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041. The control of the Indians, both as to person and lands, is wholly in the United States interior department; and, therefore, without the consent of that department, or of the agent at the reservation, an allotment of land made by the government to an Indian can not be transferred.—*State v. Alexander*, 76 Or. 329, 148 Pac. 1136. In dealing with tribal Indians in respect to severalty lands the United States has dual sources of authority. It is the owner of the fee of the lands, and may impose such conditions as it sees fit in its grant to the Indian; and it is the guardian of a people in a state of pupillage, and as such may impose such restrictions as seem advisable for their protection and welfare in the enjoyment of the ownership of their land.—*La Motte v. United States* (Okla.), 256 Fed. 5, 9. The Indian tribes recognized by the federal government are not subject to the laws of the state in which they are situated; they are under the control and protection of the United States, but they retain the right of local self-government, and they regulate and control their own local affairs, except as congress has otherwise specially provided by law.—*Anderson v. Mathews*, 174 Cal. 547, 163 Pac. 902. Congress, in pursuance of the long-established policy of the government, has the right to determine for itself when its guardianship over Indians shall cease; it may, in the exercise of its constitutional authority, and while its guardianship over full-blood Indians continues impose restrictions on full-blood Indian heirs, requiring that conveyances by them of inherited allotted lands be approved by the Secretary of the Interior; and this without regard to the fact that the land descended to the heirs free of all restrictions on alienation, except the disability of minority.—*Moffett v. Conley* (Okla.),

163 Pac. 118. The guardianship of the United States over Indian lands does not abate upon the making of allotment and the allottee becoming a citizen of the United States.—*Wrigley v. McCoy* (Okla.), 175 Pac. 259. On the other hand, it has been held that the Pueblo Indians of New Mexico are not wards of the government, and that the title to their lands is not held in trust by the government. Nor are they under the charge of any Indian superintendent or agent. They are not Indians over whom the government, through its department, exercises guardianship.—*United States v. Mares*, 14 N. M. 1, 88 Pac. 1128, 1129. The Puyallup Indians hold lands under certain patents of the United States, have all the rights, privileges, and immunities of other citizens, and they are not under the guardianship of the United States government, nor under the charge of any Indian superintendent or agent.—*United States v. Kopp* (D. C.), 110 Fed. 160.

#### REFERENCES.

Indians as subject to state regulation. See note Ann. Cas. 1915D, 371.

(3) Enrollment, allotment, and alienation.—The legislation relating to the enrollment and allotment of "new-born" Creek children, as it stood prior to March 3, 1905, was changed by the appropriation act passed on that day, whereby the Commission to the Five Civilized Tribes was "authorized" for 60 days to receive and consider applications for enrollment of children born subsequent to May 25, 1901, and prior to March 4, 1905, and living on the latter date, and further authorized to enroll and make allotments to such children.—*Harris v. Bell* (Okla.), 235 Fed. 626, 627. Though a freedman, a member of the Cherokee Nation, secured an allotment of tribal lands on false testimony, neither such allotment, nor the allottee's conveyance thereof can be canceled by the Department of the Interior, where the allottee was a duly enrolled adult freedman citizen of the Nation and had the right to select the land.—*United States v. Whitmire* (Okla.), 236 Fed. 474, 149 C. C. A. 526. Land allotted to an Ottawa Indian can not be alienated by a guardian's sale and deed while he is a minor.—*Wiggin v. King*, 35 Kan. 410, 11 Pac. 140. As to lands allotted, under section 20 of the Cherokee Agreement of 1902, to heirs of an enrolled citizen, who died subsequent to September 1, 1902, before receiving his allotment, that agreement imposed no restrictions upon the right of alienation.—*Greenlees v. Wettack*, 43 Okla. 16, 141 Pac. 282. Section 22 of the act of April 26, 1906, had for its purpose a relieving, from existing restrictions upon the alienation of land allotments of deceased Indians, which had been or should be selected by, or for, or patented to, such Indians before their deaths; it does not apply to a case where an Indian had died prior to the selection of his allotment, or issuance of patent, and where the selection is made by the administrator or executor; land so selected is alienable by the heirs without restriction under prior legislation.—*Youngken v. David* (Okla.), 235 Fed. 621, 623. If there be both adult and minor heirs, section 22 of the act of congress of April 26, 1906, authorizes the alienation prior to date of patent, and without approval

of the Secretary of the Interior, of the interests of a minor Indian heir of less than full blood in the portion of the allotment other than the homestead, inherited from a deceased Indian allottee of the Seminole Nation, but only by joining in a sale with the adult heirs by guardian duly appointed upon order of court made upon petition filed by him.—*Lula, Seminole Roll No. 908 v. Powell (Okla.)*, 166 Pac. 1050, 1052. The surplus allotment of a duly enrolled member of the Choctaw Nation of one-fourth full-blood was, prior to the act of congress of 1908, inalienable by said allottee or his heirs, except and upon the condition that the purchaser thereof paid said allottee the appraised value of said surplus allotment as the purchase price thereof.—*Going v. Shelton (Okla.)*, 176 Pac. 562, 564. A three-eighths Cherokee Indian after reaching his majority, can make a voluntary alienation of his or her allotted lands, and such conveyance is valid and binding as against the party making it.—*Armstrong v. Goble (Okla.)*, 176 Pac. 530, 531. The heirs of those deceased Indians in whose names lands were selected and allotted after their death, under section 28, Original Creek Agreement, section 7, Supplemental Creek Agreement, and the act of congress of March 3, 1905, take such lands as heirs and not as allottees, and are governed as to alienation by section 22, act of April 26, 1906, requiring the approval of the Secretary of the Interior to such alienation, and not by sections 5 and 19, of that act, restricting alienation by full-blood Indian allottees for 25 years.—*Harris v. Bell (Okla.)*, 250 Fed. 209, 212, 162 C. C. A. 345. If a state statute, in terms, or by proper construction, would permit the alienation of a restricted Indian allotment or render a deed thereto effective, where the allotment would not be alienable, or the deed thereto effective, under the acts of congress dealing with the subject-matter, then the state law fails and is inoperative in such cases.—*F. B. Collins Inv. Co. v. Beard*, 46 Okla. 310, 320, 149 Pac. 846. Homestead property allotted to a full-blood Indian woman of the Cherokee Tribe was not, on her death shortly after allotment, alienable by her heirs until the expiration of at least 5 years after August 7, 1902, the date of the ratification of the act of July 1, 1902, under which act the restriction on alienation applied to the homestead of an allottee who died after receiving an allotment; and a full-blood heir's conveyance of such property made more than 5 years after the date of such ratification is not valid if not approved by the court having jurisdiction of the settlement of the estate of the deceased allottee.—*United States v. Halsell (Okla.)*, 247 Fed. 390, 393, 159 C. C. A. 444. The disabilities under which Indians as wards of the government are placed as to the alienation of restricted lands is very similar to those attaching to minors with reference to their contracts; false representations made by an Indian heir, to secure in the wrong county, the court's approval of a deed, do not estop him or his privies from questioning the validity of the action of that court.—*Bartlett v. Okla. Oil Co. (Okla.)*, 218 Fed. 380, 390. Partition of Indian lands is an "alienation" within the meaning of the federal law

imposing restrictions thereon.—*Lewis v. Gillard, Gardner v. Lewis* (Okla.), 173 Pac. 1136.

(4) Acts of congress.—The act of congress of March 3, 1875, confirming Indian entries under the homestead laws, but making the titles acquired thereunder inalienable for five years from the issue of patent upon the making of final proof, controls the titles so acquired, although the final proof may have been made after the passing of the act of 1884, extending to Indians the benefit of those laws, but making the government trustee for the beneficiaries for twenty-five years.—*Felix v. Yaksum*, 95 Wash. 138, 163 Pac. 481; *Robinson v. Steele*, 95 Wash. 154, 163 Pac. 486. Section 22 of the act of congress of April 26, 1906, imposing certain restrictions upon the alienation by heirs of lands allotted to members of the Five Civilized Tribes of Indians, applies where the allotment was made, not to an Indian then living, but in the name of one who had died, and for the benefit of his heirs.—*David v. Youngken* (Okla.), 250 Fed. 208, 162 C. C. A. 344. Under the congressional legislation in respect to lands in Oklahoma, allotted to members of the Five Civilized Tribes, both homestead and surplus lands of allottees, who have died since the state's admission, descend according to the laws of the state.—*Bartlett v. Oklahoma Oil Co.* (Okla.), 218 Fed. 380, 385. Section 22 of the act of April 26, 1906, subjected all conveyances of adult full-blood Indian heirs to the approval of the Secretary of the Interior, and all conveyances of minor full-blood Indian heirs to the approval of the court; and section 9 of the act of May 27, 1908, subjected all conveyances of full-blood Indian heirs to the approval of the court having jurisdiction of the estate of the deceased allottee.—*United States v. Bean* (Okla.), 253 Fed. 1, 3. Under the act of congress of 1887, the trust period during which the title to Indian lands was to be held in trust by the government began to run from the date of the approval of the allotments by the Secretary of the Interior, and not from the date of the patent.—*Reynolds v. United States* (Okla.), 252 Fed. 65, 67, 164 C. C. A. 177. The act of congress of April 18, 1912, does not confer upon the county court of Osage county jurisdiction to appoint a guardian for the estate of an Osage minor Indian where both parents are living; there is nothing in the body of the act which confers such jurisdiction and the proviso does not confer it; a proviso can not enlarge the act to which it is appended.—*Williams v. Hewitt* (Okla.), 181 Pac. 286, 288. The office of a proviso in a statute, such as the Allotment Act, concerning the jurisdiction of courts to appoint a guardian for the management and control of lands, funds, or property of the Osage Tribe of Indians, is to conditionally suspend the operation of an antecedent clause; it does not create an affirmative condition, nor defeat the operation of one already in existence.—*Williams v. Hewitt* (Okla.), 181 Pac. 286. A decision of the supreme court of the United States, as to whether or not different acts of congress relative to the power of Indians to alienate homestead lands, are repugnant or conflicting, is a decision upon a purely federal

question, and is conclusive upon the state courts.—*Felix v. Yaksum*, 95 Wash. 138, 146, 163 Pac. 481.

(5) *Disposition by will as an alienation.*—A will is an alienation, under the acts of congress relating to allotments of lands to Creek Indians.—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. The state law whereby any person over 18 years of age and of sound mind may dispose of his estate by will must, in the case of an alienation of an Indian allotment, give way to the act of congress whereby such an allotment can not be disposed of by an Indian under 21 years of age.—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. A minor, allottee of lands as being a Creek Indian, can not make a valid will disposing of his allotment.—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. A right of an Indian to devise land allotted to him under act of congress is not controlled by the state laws relating to wills, in cases where the two conflict.—*Letts v. Letts* (Okla.), 176 Pac. 234, 235. The phrase "prevented by law" in the statute providing that "no person who is prevented by law from alienating, conveying, or incumbering real property while living shall be allowed to bequeath the same by will," means prevented by the law of the state and does not apply to the Indians of the Five Civilized Tribes, who are prevented by act of congress from any of the acts named.—*In re Allen's Will*, 44 Okla. 392, 144 Pac. 1055, 1056. The act of congress which confers upon allottees of the Five Civilized Tribes to alienate real estate by will when and where the testator is of lawful age, and sound mind, is within the Oklahoma statute which declares in effect that persons who are prevented by law from alienating their real property in their lifetime, are not allowed to bequeath it by will.—*In re Allen's Will*, 44 Okla. 392, 144 Pac. 1055, 1057.

(6) *Restrictions upon alienation.*—Congress may impose restrictions on full-blood Indian heirs, and may determine for itself when its guardianship over Indians shall cease.—*Brader v. James* (Okla.), 154 Pac. 560; *Boxley v. Scott* (Okla.), 162 Pac. 688; *Cushing v. Whaley* (Okla.), 165 Pac. 135. The United States, as owner of the fee, may impose such conditions as it sees fit in its grant to an Indian; and it may, as the guardian of a people in a state of pupillage, impose such restrictions as seem advisable for the protection and welfare of such wards in the enjoyment or ownership of their land; the exercise of this latter authority in no way depends upon the former, but may operate where the land has passed from all restrictions of the grant.—*La Motte v. United States*, *United States v. La Motte* (Okla.), 256 Fed. 5, 9. The heirs of an allottee of a homestead, under a certificate issued July 26, 1901, which allottee soon thereafter died intestate, leaving no issue born after May 25, 1901, were not affected by the restrictions or limitations contained in the Supplemental Creek Agreement of June 20, 1902, and are therefore free to sell the lands, and to give good title thereto.—*United States v. Cook* (Okla.), 225 Fed. 756, 757, 758, 141



C. C. A. 22. Congress did not, either by the Original Creek Agreement, or by the Supplemental Creek Agreement, or by any other act, release its control over the alienation of lands of full-blood Creek Indians, and it still had power to continue to restrict such alienation by requiring the approval of the Secretary of the Interior of conveyances made by them; hence, the heir of a deceased Indian, to whom an allotment had been made in his lifetime, could not make a conveyance thereof without such approval.—*United States v. Western Inv. Co.* (Okla.), 226 Fed. 726, 727, 141 C. C. A. 482. An Indian homestead patent is subject to the five-year restriction upon the power of alienation provided in the act of congress of March 3, 1875.—*Felix v. Yaksum*, 95 Wash. 138, 142, 163 Pac. 481. On the death, intestate, of a full-blood Cherokee Indian without having selected lands for allotment, although duly enrolled as a member of the tribe, the administrator can make the selection, and the lands allotted thereupon to the heirs are unaffected by the five-year restriction upon alienation imposed by the Cherokee treaty; such restriction is applicable only to lands allotted to living members of the tribe.—*Sunday v. Mallory* (Okla.), 237 Fed. 526, 150 C. C. A. 408. The act of congress of May 27, 1908, relating to restrictions on the alienation or incumbrance of lands of allottees of the Five Civilized Tribes, including minors of three-quarters or more of Indian blood, and which took effect July 27, 1908, was not intended to impose the restrictions upon allotments of minors who had attained full age between August 8, 1907, when the five-year restriction of the Supplemental Creek Agreement expired, and July 27, 1908.—*Hopkins v. United States* (Okla.), 235 Fed. 95, 97, 148 C. C. A. 589. When the question of restriction on the alienation of lands allotted to members of the Five Civilized Tribes, or the right or power of alienation, is involved, resort must be had to the acts of congress relating to those matters, and to such acts alone.—*Wilson v. Greer*, 50 Okla. 387, 151 Pac. 629; *F. B. Collins Inv. Co. v. Beard*, 46 Okla. 310, 320, 149 Pac. 846. The restrictions contained in section 16 of the Supplemental Agreement of the Choctaw and Chickasaw nations on the alienation of the surplus lands of a deceased allottee, selected prior to the death, run with the land, and prevent the heirs from alienating the same before the expiration of the periods prescribed in that section.—*Wrigley v. McCoy* (Okla.), 175 Pac. 259, 261. Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not "restricted lands" within the purview of section 6 of the act of congress of May 27, 1908, prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of court, or otherwise.—*Chupco v. Chapman* (Okla.), 170 Pac. 259, 262; *King v. Mitchell* (Okla.), 171 Pac. 725, 726. A decree of court, quieting title in the grantee of lands, deeded by an Indian during the period when alienation of such lands was restricted under the act of congress, is of no effect as against either the United States or the grantor of the deed.—*Robinson v. Steele*, 91 Wash. 268, 157 Pac. 845.

## REFERENCES.

Indians as subject to state regulation. See note Ann. Cas. 1915D, 371.

(7) Same. Extension of period of alienation.—The act of congress extending from five to twenty-five years the restriction upon alienation, in the case of land grants to Indians, affected lands on which applications for homesteads had already been filed and settlement made, but final proof was yet to be made, at the time the act was passed.—*Robinson v. Steele*, 91 Wash. 268, 157 Pac. 845. An extension of the time, as to certain classes of allottees, during which Indian allotments are to be held in trust by the government, does not apply to an allottee whose period, as to restriction upon alienation had already expired.—*Reynolds v. United States (Okla.)*, 252 Fed. 65, 164 C. C. A. 177. The act of congress which prohibits any full-blood Indian of any of the Five Civilized Tribes from alienating "any of the lands allotted to him" for a period of 25 years must be confined in its effect to lands which a member of one of those tribes receives as his allotable share of the lands of the tribe by virtue of his membership therein, and not to the lands he receives by virtue of a provision whereby as an heir of another member of the tribe, dying before receiving his allotable share of the tribal lands, such lands passed to him as such heir.—*Youngken v. David (Okla.)*, 235 Fed. 621.

(8) Same. Approval of Secretary of Interior.—The control given, by act of May 27, 1908, to the Secretary of the Interior over the land of a minor Creek allottee, and of oil leases made with the Secretary's approval, ceases at the minor's death.—*Richard v. Parker (Okla.)*, 245 Fed. 330, 334, 157 C. C. A. 522. A conveyance of devised lands, made by the devisee under the will of her nephew, both of which persons were full-blood Choctaw Indians, duly enrolled as such, was held to be valid, without the same having been submitted to the Secretary of the Interior for approval, where there was no showing that the devisee would have taken by descent the entire interest in the land in controversy, which interest was secured by the will.—*United States v. Fooshee (Okla.)*, 225 Fed. 521, 139 C. C. A. 570. Full-blood heirs of a deceased enrolled citizen of one of the Five Civilized Tribes, on whose account an allotment was selected after his decease by an administrator or by the Dawes Commission, are subject to the restriction in section 22 of the act of congress of April 26, 1906, to the effect that all conveyances made thereunder by heirs who are full-blood Indians are subject to the approval of the Secretary of the Interior.—*Harris v. Bell (Okla.)*, 250 Fed. 209, 211, 162 C. C. A. 345. Section 9 of the act of congress of May 27, 1908, has a prospective effect and is not applicable to conveyances made before its enactment, and the Secretary of the Interior may, under the authority of section 22 of the act of April 26, 1906, approve a conveyance made by a full-blood Indian heir, executed prior to the passage of the act of May 27, 1908.—*Harris v. Bell (Okla.)*, 250 Fed. 209, 214, 162 C. C. A. 345. Where lands

allotted under the Osage Allotment act of congress of June 28, 1906, are held by tenants in common, some of whom are incompetent and some competent, or non-members of the tribe, leases thereof are required to be approved by the Secretary of the Interior, the remedy of the competent or non-member tenant, in case of injustice, is through separation of the various interests by partition under the provisions of section 6 of the act of 1912.—*La Motte v. United States (Okla.)*, 256 Fed. 5, 12.

(9) Same. Approval and jurisdiction of court.—Under the provisions of the federal statute, requiring the approval of a conveyance made by a full-blood Indian heir, such approval can be made only by the county court of the county of which the deceased was a resident, and which has jurisdiction of his estate; it can not be approved by the court of another county; such approval would be unauthorized and void.—*Bartlett v. Okla. Oil Co. (Okla.)*, 218 Fed. 380, 390. The purpose of that provision in the federal statute, requiring the conveyance by a full-blood Indian heir of a deceased allottee, to be approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee, under the penalty of being declared void if not so approved, was to prevent imprudent sales by this class of Indians.—*Okla. Oil Co. v. Bartlett (Okla.)*, 236 Fed. 488, 149 C. C. A. 540. Where the minor heirs of a full-blood Indian allottee resided and the allotted land was situated in Okmulgee county, and the county court of that county had plenary jurisdiction of the persons and estates of such minors at all times after that date, the approval of such court of a conveyance of such lands on January 22, 1912, made under the authority of section 9 of the act of May 27, 1908, was sufficient, without the further approval of the county court of Wagoner county, which had jurisdiction of the settlement of the estate of said allottee.—*Harris v. Bell (Okla.)*, 250 Fed. 209, 214, 162 C. C. A. 345. Where the federal statute provides that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of the allottee's land, provided that no conveyance of any interest of any full-blood Indian heir in such land shall be not valid unless approved by the court having jurisdiction of the estate of said deceased allottee," the act of a county judge in approving a deed under such provision is merely ministerial, not judicial; and any finding made by such court may be collaterally attacked.—*Bartlett v. Okla. Oil Co. (Okla.)*, 218 Fed. 380, 390. The royalties and proceeds of an allotment of a member of the Cherokee tribe of Indians, shown by the enrollment record to be a minor, are, under the provisions of the act of congress of May 27, 1908, subject to the jurisdiction of the county court in the exercise of its probate jurisdiction, notwithstanding the fact that by extrinsic evidence it may be shown that the said member had in fact attained his majority.—*Cochran v. Teehee*, 40 Okla. 388, 138 Pac. 563. The definition of minority, contained in section 2, of the act of congress of May 27, 1908, relating to the Five Civilized Tribes, and the provisions

of section 6 of the same act, respecting guardians, committing jurisdiction to the local probate courts, and for continued oversight by the Secretary of the Interior and his representations, show that congress did not intend wholly to relinquish its care for such Indians and their allotments.—*Barbre v. Hood* (Okla.), 228 Fed. 658, 660, 143 C. C. A. 180. Section 6 of the act of congress of May 27, 1908, relating to the Five Civilized Tribes, definitely commits the persons and estates of minors to the state probate courts, the jurisdiction intrusted to those courts being exclusive of that of other tribunals.—*Barbre v. Hood* (Okla.), 228 Fed. 658, 661, 143 C. C. A. 180. The deed of a full-blood Creek Indian woman executed April 24, 1907, affecting to convey land allotted April 20, 1899, to her deceased husband and descending to her as his widow and as heir of their son, is voidable, if not conforming to the provisions of the act of congress whereby no conveyance of any interest of any full-blood Indian heir of an allottee shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee.—*United States v. Western Inv. Co.* (Okla.), 226 Fed. 726, 728, 141 C. C. A. 482. The marriage of a minor male ward member of the Cherokee tribe of Indians of less than one-half Indian blood, does not of itself terminate his guardianship as to his allotment nor abate the jurisdiction of the county court, and a guardian under such jurisdiction has authority to make a sale of said minor's allotted lands.—*Kirkpatrick v. Burgess*, 29 Okla. 121, 116 Pac. 764. A minor Indian within the meaning of the act of congress of May 27, 1908, includes males under the age of twenty-one years and females under the age of eighteen years, and the marriage of such a minor does not confer upon him or her authority to sell his or her allotted lands independent of the jurisdiction and supervision of the probate courts.—*Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755. A guardianship proceeding pending in one of the United States courts of the Indian Territory at the time of admission of the state was by section 19 of the enabling act (Act June 16, 1906, ch. 33, 35 Stats. 277) and section 23 of the schedule of the constitution, transferred to the county court of the county in which was located the court in which the case was pending.—*Eaves v. Mullens*, 25 Okla. 679, 107 Pac. 433.

(10) **Removal of restrictions.**—The government, acting through congress had the same power to remove the restriction upon the alienation of Indian lands that it had to place it there in the first instance; and it had power to change the manner of transferring title to such lands.—*Egan v. McDonald*, 36 S. D. 92, 96, 153 N. W. 915. The act of congress, removing restrictions upon the alienation of lands of certain allottees, not of Indian blood, of Indians, "except minors," authorized a freedman citizen of the Creek Nation to alienate by deed her surplus allotment upon attaining her majority, though a minor at the time of the passage of the act.—*Charles v. Thornburgh*, 44 Okla. 379, 144 Pac. 1033; *Smith v. Bell*, 44 Okla. 370, 144 Pac. 1058. All restrictions against the alienation of the allotted lands of a minor Creek freedman, except minority,

were removed by the act of congress of May 27, 1908.—*McKeever v. Carter* (Okla.), 157 Pac. 56. Under the act of congress of 1902, the allotment of land to a deceased Indian allottee may be sold by his heirs themselves, if adults; and by the guardians of the heirs where the latter are minors; this act removed the restriction imposed by the act of 1889.—*Egan v. McDonald*, 36 S. D. 92, 96, 153 N. W. 915. Where a Creek Indian dies prior to allotment, the allotment must be made under section 28 of the Creek Agreement, as amended by the Supplemental Creek Agreement, and it descends to his heirs, free from all restrictions, both as to the homestead and surplus but where the allottee dies after the certificate of allotment has been issued, but before patent, the homestead descends free from restrictions, but the surplus is restricted.—*Oates v. Freeman*, 57 Okla. 449, 457, 157 Pac. 74. By reason of the act of congress of May 27, 1908, the restrictions on the alienation of the allotments of minor freedmen and minor Indians of the Creek tribe of Indians, having less than half Indian blood, are removed, and allotments of such allottees may be sold under the order and supervision of the probate courts of the state of Oklahoma.—*Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755. Under section 9 of the act of congress of May 27, 1908, the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of such allottee's lands, and the proviso of said section "that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of such allottee," imposed merely a personal restriction on the full-blood Indian heirs similar to the disability of a minor to sell his lands.—*King v. Mitchell* (Okla.), 171 Pac. 725, 726. Following *Stout v. Simpson*, 34 Okla. 129, 124 Pac. 754, it is held that under the act of congress of March 3, 1903, providing that the homestead "shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment," death removes all restrictions imposed by the Original Seminole Agreement upon the alienation of the tract of 40 acres designated as a homestead.—*Lula, Seminole Roll No. 908 v. Powell* (Okla.), 166 Pac. 1050, 1052.

(11) **Marketable title.**—Where the concrete question presented to a court is only one of marketable title to Indian lands, the title to such lands is not a marketable title, if such title is not free from reasonable doubt, as where patents thereto do not show whether they were issued under the act of 1875 or the act of 1884, thereby raising a doubt as to the period of restriction upon the power of alienation.—*Robinson v. Steele*, 95 Wash. 154, 159, 163 Pac. 486. A restriction, in a trust patent to an Indian allottee, upon the alienation of the land for a period of 25 years, imposed by the act of congress of 1889, was binding not upon the allottee alone but also upon his heirs; such restriction runs with the land; but the subsequent act of congress, of 1902, removed such restriction, so that an adult heir of a deceased Indian allottee could

convey a merchantable title to the land.—*Egan v. McDonald*, 36 S. D. 92, 97, 153 N. W. 915.

(12) **Probate attorney.**—The grant of authority conferred upon the probate attorney in relation to property and interests of minor allottees comes from congress, and necessarily includes the right of appeal; and the state courts having accepted the jurisdiction of cases of such minor allottees, they can not require the probate attorney to furnish an appeal bond as a condition precedent to the prosecution of an appeal, for the reason that congress has not required it.—*In re Hickory's Guardianship* (Okla.), 182 Pac. 233, 235. Under the authority of the act of congress approved May 27, 1908, the probate attorney may "go to the further extent of prosecuting any necessary remedy . . . to preserve the property and protect the interest of minor allottees," and under the power thus granted the right of appeal is carried, and this power is greater than that of the guardian, so that where there is a conflict the power of the probate attorney must prevail, and he may exercise the right of appeal without regard to whether the guardian consents or not.—*In re Hickory's Guardianship* (Okla.), 182 Pac. 233, 234. Full and complete powers to preserve and protect estates of minor allottees under the act of congress, approved May 27, 1908, necessarily means that all legal issues raised by the probate attorney must be determined and passed upon in the trial and appellate courts before any judgment affecting the interest of any minor allottee, whom it is his duty to represent, shall become effective.—*In re Hickory's Guardianship* (Okla.), 182 Pac. 233, 235. In prosecuting appeals the probate attorney must follow the necessary procedure, but the right of appeal can not be denied him by any condition precedent not required by congress.—*In re Hickory's Guardianship* (Okla.), 182 Pac. 233, 235.

### 3. Control of property, support, maintenance, and custody of ward.

(1) **Control of property.**—Guardianship by nature extends only to the custody of the person of the ward, and not to his property. To entitle a guardian to manage the property of his ward, he must be duly appointed by some competent authority.—*Kendall v. Miller*, 9 Cal. 591, 592. The property of the ward is in custody of the law, and is not subject to attachment or execution. His estate is administered under the direction of the county court; the powers and duties of the guardian in the management of the estate and the payment of debts being specified by the statute.—*Sturgis v. Sturgis*, 51 Or. 10, 131 Am. St. Rep. 724, 15 L. R. A. (N. S.) 1034, 93 Pac. 696, 700. Neither a guardian nor his grantee can set up possession to, or title in, land adverse to the ward.—*Lono v. Phillips*, 5 Haw. 357, 358. A general guardian of the estate of a minor is entitled to the exclusive possession, together with the care and management of the estate of such minor committed to his trust, which can not be limited by order of court as to its custody, and where, on annual settlement, the court found the amount due such

minor and ordered the same paid by said guardian to the clerk of the court, that part of the order to make such payment is void.—In re Bolin's Estate, 22 Okla. 851, 98 Pac. 934. It was the duty of the guardian, as trustee of the investment fund, to retain absolute control thereof, and to withdraw the money from the bank upon the slightest indication of danger or loss. He can not perform his duty promptly if he is clogged by the necessity of procuring the concurrent action of other persons.—Estate of Wood, 159 Cal. 466, 36 L. R. A. (N. S.) 252, 114 Pac. 992. Where there was a relinquishment of control over the permanent investment by the guardian by leaving the bank book in the control of a surety company which was the sole surety on the guardian's bond, so that the guardian could make no draft upon the fund without its consent, the guardian thereby became a guarantor of the fund, irrespective of his motive or of whether his surrender of control was the cause of the loss of the fund. Where the loss occurred through failure of the bank, the court will not inquire, in determining the liability of the guardian, whether such loss was due to his abdication of control of the investment.—Estate of Wood, 159 Cal. 466, 36 L. R. A. (N. S.) 252, 114 Pac. 992. It is held that if it be desired to provide some method by which a surety company may have some control of a trust fund as to which it has merely become surety for an officer of the court, such as a guardian or administrator, to whom the court has given such fund in charge, the method must be provided by the legislative department of the government; for the law, as it now stands in this state, does not authorize it.—Estate of Wood, 159 Cal. 466, 36 L. R. A. (N. S.) 252, 114 Pac. 992. Under the Oklahoma statutes a special guardian has power over the property of his ward "unless otherwise ordered," and it seems that such guardian has power to sell the land of his ward pursuant to an order of the county court in probate.—Baker v. Cureton, 49 Okla. 15, 150 Pac. 1090, 1093.

(2) Support and maintenance.—An allowance may be made to the mother of minor children for their maintenance during the time when there were no letters of guardianship upon their estates. But she is chargeable, in equity, as a quasi-guardian or trustee of their estates, and the accounting must be deemed in the nature of an accounting in equity, and be determined upon equitable principles. The rule in equity is, that, where an infant has property of his own, and his father is dead, or is not able to support him, he may be maintained and educated out of the income of property absolutely his own, by the person in whose hands the property is held; and a court of equity will allow all payments made for this purpose, which appear upon investigation to have been reasonable and proper. Where the income is insufficient for the maintenance and education of a child, equity will break into the principle. A mother will be allowed, in equity, for the past maintenance of her children after the death of the father, out of the estate of the children, though she has a separate estate. The criterion for determining whether a past maintenance

should be allowed is, whether a court of chancery would have authorized it in advance.—*Estate of Beisel*, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819. A family of children, under ordinary circumstances, should be kept under the care and nurture of their mother, if possible. But when this is done, it is exceedingly difficult to have accurate accounts kept, showing the precise expense on account of each child; and it is customary to apply to the court for an order fixing a lump sum by the week, month, or by the year, which is to be allowed and paid to the mother for such maintenance. This is perhaps the better method, as it serves as a protection to the guardian against a subsequent revision of his conduct, and also, to some extent, as a protection to the children against excessive payments. It also avoids the great expense that would be involved in the keeping of separate accounts of supplies furnished to each child. To do this, a previous order of the court is not necessary.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 459. It is the duty of a guardian to see to it that his ward is suitably maintained, and, upon proper application therefor, the county court may, and will, authorize the use of the principal of his ward's funds, as well as the income thereof, if necessary, for that purpose. The usual, and no doubt better, practice is to obtain an order authorizing the expenditure, and, as a general rule, the guardian can not encroach upon the principal without such order. But it is believed this rule is not inflexible, so that, if the income is not sufficient, and the ward's welfare requires it, the court may resort to the principal and if he has in fact used a part of it for the support and maintenance of his ward without authority of the court, it may, and will in a proper case, ratify such expenditure. If, however, he has taken this responsibility, he is required to make out as clear a case to obtain the order ratifying the expenditure as if he had applied for authority in advance. The true criterion in such case would seem to be whether the court would have antecedently authorized the expenditure.—*Cutting v. Scherzinger*, 40 Or. 353, 68 Pac. 393, 395. A reasonable amount should be allowed to a guardian for the maintenance of his ward, but if he, without the approval of the judge, spends more than the income on the maintenance of his ward, he does so at his peril.—*Guardianship of Kaku*, 17 Haw. 517, 518. After payment of the ward's debts, the balance is the principal, which must be invested by the guardian, and the income and profits accruing from it are all that the guardian may expend for the maintenance of his ward. He can not break into the principal, for such purpose, without authority of the court.—*Guardianship of Duncan*, 3 Haw. 543, 544. If there is no proof of a regular allowance made to a guardian for the maintenance of his ward, and it appears that payments were made at irregular intervals, as necessity required, the guardian's estate can not, upon an accounting by the executor of the deceased guardian, be allowed a lump sum for further payments not shown to have been made.—*Guardianship of Hoare*, 14 Haw. 443, 447. A probate judge has power to order a guardian to increase his ward's



allowance.—Guardianship of Kapukini, 12 Haw. 22, 27. Guardian can not subject interest in ward's estate to latter's maintenance without leave of court.—Los Angeles County v. Winans, 13 Cal. App. 234, 109 Pac. 640. Orders made by the guardianship court, from time to time, for the withdrawal of funds from the possession of the administrator for the support of the wards do not indicate any knowledge on the part of the court that the guardian had made any permanent deposit of the funds, nor imply any ratification of the same or of the mode of the control thereof.—Estate of Wood, 159 Cal. 466, 36 L. R. A. (N. S.) 252, 114 Pac. 992. A guardian of the person and estate of an infant is under no legal duty to furnish supplies to the ward out of property other than that belonging to the estate of the ward, which is under his control and subject to be applied to that purpose.—In re Harris (Wupperman v. Lyon), 17 Ariz. 405, 409, 153 Pac. 422. A guardian of the estate of a minor, when another is guardian of the person, is not charged with the duty of furnishing the ward with necessaries suitable to his or her station of life.—In re Harris, Wupperman v. Lyon, 17 Ariz. 405, 409, 153 Pac. 422. If a father, duly appointed guardian for his minor children, is unable to support and educate them, but they have property, the income of which will do so, he may under the direction of the county court apply such income to that purpose, but in no case should he create a lien against their estate, or fix a charge against the proceeds of a sale thereof, in the absence of a specific authorization therefor by the county court.—J. H. Cox & Co. v. Fisher (Okla.), 161 Pac. 171; Donnell v. Dansby, 58 Okla. 165, 159 Pac. 317. A father may apply the income of children to their support as directed by the county court.—Donnell v. Dansby, 58 Okla. 165, 159 Pac. 317.

#### REFERENCES.

Maintenance of ward. See note 1 L. R. A. 304, 305.

(3) Contract for support.—The guardian may make a contract for the support of his wards without the sanction of the court; and if it is for a reasonable amount, the court should allow him credit therefor in his account. Guardians are not always men of great efficiency in the matter of bookkeeping, and the estates are not always of sufficient amount to justify an elaborate system of accounts. In cases where such a contract is made without the order of the court, it is a sufficient itemization to state, in the report accompanying the account, or elsewhere in the account, the particulars of the contract or agreement made to secure due maintenance of the ward, and to state in the account proper the sums paid in pursuance thereof; though it would be the duty of the court to scrutinize the contract or arrangement whereby the money was applied to maintenance, and to see to it that it was just and fair, and that the sum for which credit was claimed did not exceed the sum paid in pursuance of the agreement. If the guardian acted in good faith, and the contract was fair and just, the fact that the precise expense for each child was not separately pro-

vided for by the arrangement made, or was not shown in the account, would not, of itself, deprive the guardian of the right to credit for money actually paid or applied to the support of the ward.—Estate of Boyes, 151 Cal. 143, 90 Pac. 454, 459. In view of the provision of section 208 of the Civil Code of California, that a "parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation," the acquiescence of a father in the voluntary support of his child by its grandparents can not be construed as a willful failure by him to support it, within the meaning of subdivision 4 of section 246 of that code.—Matter of Forrester, 162 Cal. 493, 123 Pac. 283. Where a person agreed, for a stated amount per week, to board and care for a ward, and the bill for compensation at such rate was presented each month for several years to the guardian, which the latter paid, but the ward finally died, and an administrator was appointed for his estate, whereupon a demand was filed against the administrator for additional compensation, such promisor was held to be estopped from claiming that an increased rate had been agreed upon, or that he was entitled to recover more because the services rendered were worth more than the contract price.—Burhardt's Estate, *In re Weaver v. Skinner*, 103 Kan. 97 172 Pac. 1024.

(4) **Support of abandoned child.**—While a father, who has abandoned a child, may be deprived of its custody by a summary proceeding in guardianship, he can not be compelled to compensate the guardian for the support of such child. A parent who has been deprived of the custody of his child by such a summary proceeding is no longer liable for its support, and, aside from the cases of divorce, and actions between the parents in regard to the custody of children, there is no other case in which the court has power to deprive the parent of his authority, and yet hold him liable for the support of his child, except under a statute providing that a civil action may be brought by a child, or certain relatives, against the parent for abuse of parental authority, in which the duty of support may be enforced.—*In re Ross*, 6 Cal. App. 597, 92 Pac. 671, 672.

(5) **Custody of ward. Access.**—When a court of competent jurisdiction appoints a guardian of the person of a minor, such minor becomes a ward of the court, and the guardian is, in effect, an arm of the court, and is subject to the control of the court in the discharge of his duties as such guardian. Such court has authority to control and direct the guardian in the performance of his trust so as to insure the proper care of the infant. Hence, although a guardian has been appointed for an infant abandoned by its father, it is not an abuse of discretion for the court to allow the father access to the child, where he is a fit and proper person.—*In re Ross*, 6 Cal. App. 597, 92 Pac. 671, 672.

#### 4. Duties and powers of guardians.

(1) *In general.*—It is a recognized principle that statutory guardians have an authority coupled with an interest, not a bare authority; and it is not within the power of the legislature to take the estate of minors out of the hands of their guardian, and to withdraw it from the control of the probate court, by authorizing another party to dispose thereof. Such an act would be judicial and not legislative in its character, and for that reason would be unconstitutional.—*Lincoln v. Alexander*, 52 Cal. 482, 486, 28 Am. Rep. 639. If the court does not specially appoint a guardian ad litem for a particular action, it is the duty of the general guardian to appear for his ward.—*Gronfier v. Puy-mirrol*, 19 Cal. 629, 632. Under statutes, as well as at common law, the guardian has the right to the custody and control of his ward's estate, and the court has no power to interfere with a guardian's custody and general management of his ward's property, except, of course, for conduct authorizing suspension or removal.—*De Greayer v. Superior Court*, 117 Cal. 640, 59 Am. St. Rep. 220, 49 Pac. 983, 984. A statute which provides a mode of determining the abuse of parental authority is not a limitation upon the authority of the superior court to appoint a guardian or petition to that court.—*Ex parte Miller*, 109 Cal. 643, 42 Pac. 428. A guardian is not remiss in his duty by failing to apply for a family allowance from the estate of the ward's deceased father for their support; and where the entire estate of the wards in the hands of the guardian consisted of a certain sum of money due each ward, derived from the life-insurance policy on the life of the father, the fact that the guardian failed to procure an order for family allowance will not prevent him, as guardian, from being allowed credit for payment out of the insurance-money for the support of his wards.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 456. A guardian should follow the directions of the statute, and make the accounts and reports therein required of him. His own safety, the requirements of business prudence, and the welfare of the ward and his estate, demand this. The statute, however, does not require annual accounts of guardians, but it would be better for all concerned if so made. At the same time, it can not be said that a failure to comply strictly with the statute, or neglect to render accounts with some regularity and promptness, necessarily imposes punitive responsibility upon the guardian. If there be loss to the estate, the question of the guardian's liability therefor depends much upon the circumstances under which the loss occurred.—*Curtis v. Devoe*, 121 Cal. 468, 53 Pac. 936, 938. The guardian of an infant appointed by the probate court is not a trustee of an express trust.—*Fox v. Minor*, 32 Cal. 111, 117, 91 Am. Dec. 566. One who accepts an appointment as guardian, and takes charge of the ward's estate, places himself within the jurisdiction of the court, becomes an officer of the court, is answerable to it for the faithful performance of his trust, and is forever afterward estopped by the record from denying his accountability.—*Fox v. Minor*, 32 Cal. 111, 119, 91 Am. Dec. 566. A

guardian who makes a loan of his ward's funds, must exercise a greater degree of care, where he acts on his own responsibility than where he makes one at the direction of the court.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661. If a general guardian has been appointed and has qualified, it is his duty to sue for and to receive all debts due to his ward, and to appear for and to represent him in all legal proceedings, unless another person is appointed for that purpose as guardian ad litem or next friend.—*Brewer v. Perryman* (Okla.), 162 Pac. 791. Where a note was given to a guardian, for the money of the ward lent by such guardian, and the guardian accepts in satisfaction of the note the full amount, principal and interest, for which the makers are then obligated, at a time prior to the maturity of the note according to its tenor, his act does not, under the Oklahoma statute, constitute a compounding of the debt, and the approval of his act by the county judge is not required.—*Mason v. Ackley*, 52 Okla. 157, 152 Pac. 846; *Mason v. Evans*, 52 Okla. 481, 153 Pac. 133. If the guardian has lent the money of his ward, such loan being evidenced by a promissory note payable to the guardian, the latter may collect it; and if the note is secured by a mortgage, the guardian has power, without the intervention of the county court, to release and discharge the mortgage.—*Mason v. Ackley*, 52 Okla. 157, 152 Pac. 846; *Mason v. Evans*, 52 Okla. 481, 153 Pac. 133. Where the statute requires a guardian to receive all debts due to his ward, the word "due" covers liabilities matured and unmatured; it imports simply existing obligations, whether the time for payment has arrived or not.—*Mason v. Ackley*, 52 Okla. 157, 152 Pac. 846. Where a purchaser in good faith at a void guardian's sale pays the purchase price thereof to the guardian, the latter holds the money as a trust fund for the use and benefit of the purchaser; it does not belong to the ward; and where the title to the property fails on account of the proceedings being void, it is the duty of the guardian to refund the money to the purchaser; if any party, with knowledge of the trust, receives any part of such money he acquires no title to the fund as against the true owner; he is properly made a party defendant in an action to quiet title to the property; and an action to recover such part of the money so received will lie in favor of the true owner against the party to whom such part of the fund was transferred contrary to the trust.—*Brook v. Wertz* (Okla.), 160 Pac. 903.

#### REFERENCES.

Common-law powers of guardians.—See note 89 Am. St. Rep. 257, 316. Right of guardian to remove incompetent or infant from the state.—See note 58 L. R. A. 931-937.

(2) Power of guardian as to contracts.—A guardian, in making contracts relating to the estates of his wards, can bind himself only, and can bind neither his wards personally nor their estates.—*Shepard v. Hanson*, 9 N. D. 249, 83 N. W. 20. The guardian of minor heirs has no power to bind them by a contract that they shall pay a certain por-

tion of the indebtedness of the estate.—*Luck v. Patterson*, 2 Colo. App. 306, 30 Pac. 253, 254. A guardian's deed made without any order or authority from any court is a nullity.—*Palmer v. Abrahams*, 55 Wash. 352, 104 Pac. 649. A guardian can not make a contract which will bind the person or estate of his ward unless authorized by a court of competent jurisdiction.—*William Cameron & Co. v. Yarby* (Okla.), 175 Pac. 206. The addition of an official character to the signature of a guardian, executor, etc., in executing written contracts and obligations has no significance, and operates merely to identify the person; it does not limit or qualify the liability.—*Jones v. Johnson* (Okla.), 178 Pac. 984, 985. A guardian is without power to make a contract, however beneficial to the ward, that is binding on the ward or the ward's estate; such contracts made by him impose a liability upon himself personally, and such security as he has from loss lies only in his right to charge the expenditure to the ward's estate in his account.—*Jones v. Johnson* (Okla.), 178 Pac. 984, 985.

#### REFERENCES.

Power of guardian to compromise or settle claims of ward.—See note 1 L. R. A. 305.

(3) Same. Contracts with Indians.—A contract entered into subsequent to the passage of the Curtis bill (act of congress of June 28, 1898, chap. 517, 30 Stat. 495) and prior to the Creek Treaty of 1901 (act of congress of March 1, 1901, chap. 676, 31 Stat. 861) purporting to bind certain infants for the purchase price of improvements upon lands in the Creek nation taken by them as allotments, executed by their natural guardian, who did not submit himself or his actions to a court having jurisdiction, is void as to such infants.—*Beck v. Jackson*, 23 Okla. 312, 101 Pac. 1109. A minor allottee of the Five Civilized Tribes is not bound by a contract entered into by his guardian during the ward's minority affecting the minor's lands or the proceeds therefrom.—*Southern Surety Co. v. Lephew* (Okla.), 173 Pac. 438.

(4) Sale of minor's interest not valid unless made, how.—A guardian's sale of the real estate of a minor, whether Indian or not, could only be made in 1912, in conformity with the probate laws of the state, and such a sale made otherwise, although approved by the county court having jurisdiction of the minor's estate, is absolutely void.—*McCoy v. Mayo* (Okla.), 174 Pac. 491, 494. The approval of the Secretary of the Interior was not necessary to the validity of a guardian's deed to the interest of a minor in the lands of his full-blood Creek Indian mother, executed October 10, 1911, where the mother died about February 21, 1911, and it did not appear that the minor was of full blood.—*Moffet v. Jones* (Okla.), 169 Pac. 652, 654. A contract of sale, made by the guardian of a Cherokee Indian minor prior to statehood, but after the approval of the act of congress of April 26, 1906, and prior to that of May 27, 1908, of inherited lands allotted to his father, there being adult heirs, and without an order of court "made upon

petition filed by the guardian," was void.—*Talley v. Burgess*, 46 Okla. 550, 149 Pac. 120, 121. After the passage of the act of congress of April 26, 1906, and prior to the passage of the act of May 27, 1908, it is held upon the authority of *Brader v. James*, 154 Pac. 560, that when there are both adult and minor heirs, a valid sale of the interest of the minor heir in the portion of the allotment designated as a homestead can be made only upon the condition and in the manner prescribed in section 22, of the act of April 26, 1906.—*Lula, Seminole Roll No. 908 v. Powell (Okla.)*, 166 Pac. 1050, 1052. The county court is absolutely without jurisdiction to authorize a sale of a minor's real estate for part cash and part exchange of property, and such a sale is void although otherwise in strict conformity with the probate laws of this state.—*McCoy v. Mayo (Okla.)*, 174 Pac. 491, 494. An order of court authorizing a guardian to expend a specific sum of money for improvements does not authorize the guardian to make a contract which shall bind his ward, or his ward's estate, for materials furnished, such as will hold the ward or his estate liable at the instance of the furnishing party.—*William Cameron & Co. v. Yarby (Okla.)*, 175 Pac. 206, 207.

## REFERENCES.

Common-law powers of guardian.—See note 89 Am. St. Rep. 257.

(5) Power of guardian to assign appropriation made for ward by probate court.—Where an estate is in the hands of a probate court which makes an appropriation of a part thereof to the immediate use of infant wards, by an order directing the executors to pay to the mother of such wards, as guardian, a said sum of money, such order is an appropriation, which the guardian may assign, without leave of the probate court, and the assignee may maintain an action against the executor to recover the money.—*Schmidt v. Wieland*, 35 Cal. 343.

## REFERENCES.

Right of guardian to surrender policy in favor of ward.—See note 35 L. R. A. (N. S.) 1123.

## 5. Rights and powers of guardians.

(1) In general.—A guardian of a minor does not, like executors and administrators, who hold the legal title of decedents to the personal estate for the benefit of creditors and distributees, hold the legal title to any part of his ward's estate; but his power over such estate is a naked trust, coupled with an interest, and the ward himself holds the legal as well as the beneficial interest to personal as well as real property of his estate.—*Title G. & T. Co. v. Cowan (Okla.)*, 177 Pac. 563, 565. A general guardian has power to appear for his infant ward without service of summons, and where he appears and files an answer, the trial of the case within ten days following service of summons on the minor is not premature.—*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 597, 157 Pac. 1127. A guardian has no right to use his

ward's funds for his own private purposes, but, having done so it is his duty, in his accounts, to disclose that fact to the court; and his failing to do so amounts to constructive fraud.—*Smith v. Smith* (Mont.), 210 Fed. 947, 951. The guardian has no authority to direct a purchaser of his ward's property to pay his personal obligations; and such a purchaser, who does pay the guardian's personal obligations, participates with the guardian in a diversion of the ward's funds and becomes liable in an action for their recovery.—*Harris v. Wilcox* (Okla.), 175 Pac. 352, 354.

#### REFERENCES.

Guardian of insane person or other incompetent may receive proceeds of sale, in partition proceedings, of such party's interest.—See post, § 168.1

(2) *Guardian may do what.*—A guardian of the person and estate of minors should personally administer his trust, and not permit the business affairs of his ward to be transacted by others, but, under peculiar circumstances, he may be excused for allowing this to be done. Thus the guardian of an old man may permit the business affairs of his ward to be managed by others than himself, where such other persons are relatives, and are not only conversant with his affairs, but the children and heirs at law request such different management, and no creditor appears to contest the account.—*Racoullat v. Requeña*, 36 Cal. 651, 656. A guardian may pay claims against his ward without prior approval by the probate court or judge.—*Racoullat v. Requeña*, 36 Cal. 651, 657. Expenditures by a guardian for repairs on his ward's property are upheld on the ground of protection to the capital and property of the ward. The right, and even the duty, of a guardian to protect the land and premises of his ward by reasonable and proper repairs can not be seriously questioned, although it is, no doubt, better that he first obtain the sanction of the court. So a disbursement for the protection of the capital of the ward, invested in property other than lands, should be upheld upon the same principle, if the same be reasonable, and necessary and beneficial to the estate. It follows that the guardian may purchase certain capital stock of a corporation, to save the other shares of his ward therein from depreciation, if not destruction, in value; and such a purchase, reasonably made for the protection of such other shares of corporate stock, is not within the constitutional inhibition against the investment of trust funds in shares of stock of private corporations. To deny such right of purchase, by way of protection, by reason of the constitutional restriction, would be to deny the right to buy one share, even if that alone would be the means of saving a much larger investment from total loss.—*Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 154, 158. In the absence of fraud or collusion, a minor, properly represented, is bound as fully as if he had been a major and personally cited. The guardian of a minor, therefore, is justified in admitting in his answer that a homestead, involved in

certain partition proceedings, was community property.—*Kromer v. Friday*, 10 Wash. 621, 32 L. R. A. 671, 39 Pac. 229, 234. If a guardian acts with judicial authority, he binds his ward, and where the ward, for many years after attaining majority, assents to a partition made by his guardian, he is bound thereby. A parol partition which has been actually consummated by possession and dominion in severalty, and which has been confirmed upon long-continued acquiescence, and by many changes of title, ought not to be, and will not be, distributed in equity.—*Brazee v. Schofield*, 2 Wash. Ter. 209, 3 Pac. 265, 268. Under a statute authorizing any person interested in the estate of a deceased person to appear and file his exceptions, in writing, to an administrator's account, and to contest the same, the guardian of the estate of minors is interested as such guardian, and has a right to appear and contest such account in an estate where his wards are interested; and the appointment of an attorney by the court for the minors can not take from the guardian the right to be heard.—*Estate of Rose*, 66 Cal. 241, 5 Pac. 220. Where a guardian purchased his ward's property for its full value and in due time accounted fully and fairly for the purchase money it was not a wrongful act for him to use the ward's money to make payments on account of the price when he himself personally was quite responsible for the amount and had given ample security therefor.—*Smith v. Smith*, 45 Mont. 535, 125 Pac. 1002.

(3) Guardian can not do what.—A guardian has no power to make a contract binding upon the ward or upon his estate, however proper and beneficial the contract may be. Contracts made by him affecting his ward or his estate impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditure to the ward's estate in his account.—*Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888, 890. The guardian can not therefore mortgage the real property of his ward for the purpose of paying debts, where there is no provision of the statute allowing him to do so.—*Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888. So a contract made by him without order of court, for legal services to be rendered in establishing the ward's right to an estate, payment to be made out of the proceeds of such estate, is unauthorized.—*Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896, 898. Nor has he any right to bind his wards by contract that each shall pay one-half of all "claims against the estate," where such claims against the estate were not the debts of the estate, but debts contracted in administering the estate. The debts against an estate are, and of necessity can only be, those contracted by the parties before death, before the property becomes an estate to be administered. A debt contracted by the administrator, many years after the death, is not a debt due by the estate, but one contracted in course of administration. To allow any debt contracted in administering an estate as the debt of an estate would be error, where the allowance was made solely upon the authorization of the administrator, who had contracted it; and it makes no difference that



the services for which the debt was contracted were beneficial to the administrator and to his children as heirs. Such fact would not make the claim for such services a legal demand against the estate. There is a wide distinction between debts due by an estate and those contracted in the course of an administration, and in the manner of their allowance.—*Lusk v. Patterson*, 2 Colo. App. 306, 30 Pac. 253, 254. A guardian, who has not obtained an order of court authorizing him to perform work on the property of his ward, can not subject the property of his ward to a mechanic's lien for work done thereon by a mechanic under a contract with the guardian.—*Fish v. McCarthy*, 96 Cal. 484, 31 Am. St. Rep. 237, 31 Pac. 529. If the guardian of a minor's estate makes his individual mortgage to his ward to secure a debt due from him to the estate, the guardian can not satisfy such mortgage without authority of the court, and without payment of the debt.—*Jennings v. Jennings*, 104 Cal. 150, 37 Pac. 794, 796. If a guardian makes application for a substitution of attorneys, an order for such substitution does not authorize a contract with the new attorney affecting the ward's property.—*McKee v. Hunt*, 142 Cal. 526, 77 Pac. 1103. The executors of a deceased guardian have no authority to present his account for settlement to a probate court, nor has such court jurisdiction over the matter.—*In re Allgier*, 65 Cal. 228, 230, 3 Pac. 849. The general guardian of a minor, as such, has no right to the custody and management of trust property. It is for the trustees to manage the trust fund, under the directions of the court, paying for the maintenance and support of the minor such sums as may be necessary, paying them, indeed, to the general guardian of the minor, if the court should hold such to be the advisable course, and being protected in their payments by the order of the court. But, on the other hand, if the execution of the trust be arrested for lack of a trustee, it is proper for the guardian to apply to the court to fill the vacant trusteeship, and the court, in the exercise of its powers, may appoint any fit and proper person, whether the guardian or another, to the vacancy. But, if the guardian should be appointed, he would not take the trust property as guardian, but as trustee.—*Hallinan v. Hearst*, 133 Cal. 645, 55 L. R. A. 216, 66 Pac. 17, 19. The last will and testament of the ward is not an asset of his estate, nor is it any evidence of the ward's title to property. Neither is it an instrument which the guardian can use in the recovery of an asset. It can not in any way relate to any matter within his power or duties, nor in any manner affect his action as a guardian, because it can not take effect until after his authority has ceased. He certainly can not annul, revoke, destroy, or in any way dispose of it, nor can the court authorize him to do so, and he is not entitled to its possession or to a knowledge of its contents. If it were in his hands, of course it would be his duty to preserve it. But a person, if competent to make a will, has a right to select its custodian, and the subsequent incompetency of the maker of the will does not entitle the guardian to the possession of the

instrument.—*Mastick v. Superior Court*, 94 Cal. 347, 349, 29 Pac. 869. So far as general uses are concerned, it is not necessarily incompatible to unite in the same person the capacities of administrator and guardian. But, in a special proceeding set on foot by such person, as administrator, against his ward, and for the distinctive purpose of divesting the ward of his title as heir, such person can not represent the ward.—*Townsend v. Tallant*, 33 Cal. 45, 52, 91 Am. Dec. 617. A guardian or other trustee has no moral or legal right to mingle trust funds with his own private property, or to profit by the use of the funds belonging to the cestui que trust.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661. Where the husband was appointed as guardian of the minor children by the probate court, he had no power to bind their interests by contract or by mechanics' liens without an order of the court.—*County of Los Angeles v. Winans*, 13 Cal. App. 234, 109 Pac. 641.

## REFERENCES.

Duties and powers of guardians.—See ante 4, subd. 1; also § 108 ante, and § 168 post.

(4) Actions by guardian.—A guardian is not permitted to bring suit in his own name, and in his individual capacity, for money or property belonging to the ward; but must bring suit as guardian.—*Dennison v. Willcut*, 3 Ida. 793, 35 Pac. 698. If, pending a suit by a guardian, the ward becomes of age, he is entitled to be substituted as plaintiff, where the guardian has been discharged, and revivor is neither necessary nor proper.—*Shattuck v. Wolf*, 72 Kan. 366, 83 Pac. 1093. An averment, in a petition, that a guardian was appointed is put in issue by a verified answer denying generally the averments of the petition, where the affiant states that the denials or contents of the answer are true.—*Cable v. Drew*, 70 Kan. 136, 78 Pac. 427. If an action is brought in behalf of minors by their guardian, it is incumbent upon the guardian to set out facts in an issuable form, in his complaint, which show his representative capacity and the character in which he sues; and a complaint, in such a case, which does not do so is demurrable. But such demurrer must be special, and upon the ground of want of capacity to sue, and, unless so made, such objection is waived.—*Dalrymple v. Security L. & T. Co.*, 9 N. D. 306, 83 N. W. 245. In an action by a guardian of the estate of minors, upon a promissory note which is, in terms, payable neither to such guardian nor to his wards, but to another person, and is not indorsed either generally or by special indorsement, the ownership of which is challenged by an express denial in the answer, it is held, under the evidence referred to in the opinion, showing that said note was delivered to the county court by the payee, who formerly had been guardian of the estate of said minors, to cover a shortage arising from his unlawful use of the trust funds, and that the same was accepted by said court, that title thereto is established in the wards.—*Shepard v. Hanson*, 10 N. D. 194, 86 N. W. 704. The marriage of a male ward, a Cherokee freedman, does not terminate

guardianship as to his allotted lands, and suit may be maintained by his guardian relative thereto.—*Reid v. Taylor*, 43 Okla. 816, 144 Pac. 589. If an action is brought by a guardian on a promissory note payable to him as such guardian, the fact that his wards prior to the bringing of the action reached their majority, or married, is not a defense to such action or ground for its abatement.—*Kerr v. McKinney* (Okla.), 170 Pac. 685. If a petition avers that the plaintiff is the duly appointed, qualified, and acting guardian of certain minors, to which an unverified answer is filed, the guardianship is admitted, and the guardian in his own name may maintain an action for property belonging to his wards without joining them as parties in the action.—*Kerr v. McKinney* (Okla.), 170 Pac. 685. A mother is not empowered to sue for her children where her husband is regularly appointed guardian.—*Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640. Where a guardian employed independent counsel, who conducted a thorough examination of the witnesses and cross-examined the adverse party fully, and otherwise conducted the litigation on behalf of his clients in good faith, and believed the truth of such adverse party's testimony and there was no evidence available to meet it, and that it was corroborated by other testimony, collusion is not established by the mere fact that the guardian was the selection of such adverse party, the widow of the person in whose name the property in the suit to quiet title stood.—*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 594, 157 Pac. 1127. An action may be maintained by a guardian to recover money realized on a check drawn by his insane ward in favor of the defendant.—*Gardner v. Spalt*, 86 Wash. 146, 149 Pac. 647. The statute of Arizona, whereby no guardian appointed under the laws of that state can be required to give security for costs, does not, in respect to actions in the federal courts, prevail against the act of congress of July 20, 1892, which gives such immunity to guardians only on their filing a pauper's oath.—*Silvas v. Arizona Copper Co.* (Ariz.), 213 Fed. 504, 506.

(5) **Actions against guardians.**—It is well established that a settlement of an administrator's account by the decree of a probate court does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased, or to the creditors of the estate, may require, even if the probate court might, in such case, open its decree, and administer upon the omitted property; and a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.—*Lataillade v. Orefia*, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924, 926. In an action against a guardian for an accounting as to moneys received by the defendant, and in part held by him in trust for the plaintiff, the money received constitutes, in defendant's hands, a single fund, though derived from sales of real

and personal property, and received at different times.—*Lataillade v. Orefia*, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924. If a plaintiff had no knowledge and no reason to suspect, that a fraud was being practiced upon him, there was nothing to put him upon inquiry, and, under such circumstances, it can not be said that he failed to use due diligence to detect the fraud, and he can not be presumed to have known anything concerning it. Hence, if the complaint states when the discovery of fraud was made, and what it was, and how it was made, and why it was not made sooner, it is sufficient in this respect.—*Lataillade v. Orefia*, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924, 927. In partition proceedings, where the guardian of infants having an interest in the property was personally served with process, and he answered, and was represented by counsel throughout the proceedings, the minors are bound by the acts of their representative.—*Kromer v. Friday*, 10 Wash. 621, 32 L. R. A. 671, 39 Pac. 229, 234. An action can not be maintained against a guardian upon the liability of a ward, but only against the ward, and the guardian being a proper party, he may appear and defend the action in the interest of the ward, but is not a party for the purpose of establishing a personal liability against him.—*Sturgis v. Sturgis*, 51 Or. 10, 131 Am. St. Rep. 724, 15 L. R. A. (N. S.) 1034, 93 Pac. 696, 699. A guardian's promise to pay ward's debts incurred prior to his appointment, being without consideration, is not actionable.—*Kane v. Madeiros*, 19 Haw. 564. Under section 5641, Comp. Laws of Oklahoma 1909, requiring a guardian who defends for a minor to put in issue all the material allegations of the petition, and section 5649, providing that it is unnecessary for such a guardian to verify his answer in order to put in issue the execution of written instruments and indorsements thereon, a general denial filed by such guardian puts in issue every material allegation of a petition, including allegations of the execution of written instruments and other allegations which an adult must deny under oath.—*Sims v. Hedges*, 32 Okla. 683, 123 Pac. 155. A separate suit will lie on behalf of each of several wards where each has severable claim against guardian's estate and where guardian converts ward's money and so mingles same as to prevent tracing, though wards present claim as "joint claimants."—*Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. A judgment sustaining a sale made by a guardian is not res judicata of a suit against the guardian, in the interest of the ward, for appropriating the purchase money.—*Smith v. Smith* (Mont.), 210 Fed. 947, 952.

## REFERENCES.

Right of guardian to compromise infant's cause of action for personal injuries. See note 21 L. R. A. (N. S.) 338. Power of guardian to redeem legacy. See note 28 L. R. A. (N. S.) 401. Power of court of guardian of incompetent or habitual drunkard to consent to conveyance by trustee under a trust requiring consent by the cestui que trust. See note 39 L. R. A. (N. S.) 39. Service of process on guardian. See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1722.

6. Investments by guardian.—The guardian of a minor has power to invest moneys of his ward without an order of court; but if he does so, it is generally at his own risk. If an opportunity for an investment presents itself to a guardian, he should protect himself by making an application to the court for authority to invest the ward's money. An order for investment or other management of the funds, thus obtained, will protect the guardian, although misfortune follows. But where the guardian acts upon his own judgment, he is held to a more strict accountability.—Guardianship of Cardwell, 55 Cal. 137, 141. An order of court directing the guardian to lend funds of his ward on the terms and security therein stated will protect the guardian from all liability by reason of such loan, if it is made on insufficient security. There could be no purpose in securing such order, or any reason for the enactment of the statute authorizing it, if it did not afford protection.—In re Schandoney's Estate, 133 Cal. 387, 65 Pac. 877, 878. If a guardian lends twenty thousand dollars of the estate of his ward, taking therefor, as security, sixty thousand dollars of dividend-paying stock, worth par, the ward can not except to such investment, where the guardian, before making it, examined the books of the corporations issuing the stock, and was convinced that such corporations were sound and the stock worth par, and did not make the investment until after he had taken the advice of his counsel and of the judge having control of the estate.—Nagle v. Robins, 9 Wyo. 211, 62 Pac. 154, 161. It must be observed, however, that conversations between the guardian and the judge of the court having control of the ward's estate, preceding investments by the guardian, and verbal advice of the judge to make such investments, are not such orders and directions as the statute authorizes the court to make in the premises. They may show the guardian's good faith and the knowledge of the judge at the time of entering the orders of approval; but the advice of a judge, given verbally, under such circumstances, is not to be regarded as tantamount to an order contemplated by the statute.—Nagle v. Robins, 9 Wyo. 211, 62 Pac. 154, 157. Furthermore, an intermediate order of approval of the report of a guardian does not protect him to the same extent as an original order directing such investments as the guardian may have made.—Nagle v. Robins, 9 Wyo. 211, 62 Pac. 154, 156. The guardian has power to make investments by loan, and to spend money for repairs and for the protection of the estate in his hands generally, and ordinarily without an order of court. But in doing so he runs the risk of having his acts disapproved by the court. The difference between an investment made with and one made without a previous order affects only the rights of the ward, and the liability and risk of the guardian. Where the investment is made without an order of court, it is subject to attack by the ward upon the final settlement; but where the investment is made by an order of court, it is not subject to attack by the ward upon final settlement. The

absence of an order of court, directing a loan of the ward's money, is not alone sufficient to entitle the ward to refuse to accept the investment.—*Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 154, 156, 157. If the guardian has authority to make the investment without an order previously obtained, the subsequent intermediate approval thereof stands upon the same footing as approvals of current accounts, or annual settlements of accounts, pending the continuance of the guardianship. It is generally held that such approvals and settlements, while prima facie evidence of correctness, are not conclusive upon the ward.—*Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 154, 157. In the territory of Hawaii the investment of the funds of a ward by his guardian is not restricted to public securities and real estate mortgages. Such funds may be invested in the bonds of private industrial corporations, if such bonds are amply secured by a mortgage deed of trust and are regarded with favor by prudent investors. But the purchase of such bonds, by the guardian of a minor, from a corporation of which he is the treasurer and one of the directors, is voidable at the election of the cestui que trust.—*Guardianship of Parker*, 14 Haw. 347, 358. The measure of care and skill required of a guardian in the investment of his ward's funds is such as would be exercised by a man of ordinary prudence and skill in the management of his own business.—*Estate of Wood*, 159 Cal. 466, 36 L. R. A. (N. S.) 252, 114 Pac. 992. Where a guardian, proved to have been diligent in caring for his ward's interests, did, nevertheless, neglect to change an investment made by the ward's father, since deceased, and this investment has resulted in disaster, the court, in approving the guardian's final account should consider the conditions, if there is proof, not against the preponderance of the evidence, that these were extraordinary.—*Mumford v. Rood*, 39 S. D. 276, 164 N. W. 75. If a guardian, with whom the ward has made his home, free from any charge for personal care and support given him, is made to account for the disastrous result of leaving unchanged an investment made by the ward's father, he is entitled to credit for the reasonable expense of such care and support.—*Mumford v. Rood*, 36 S. D. 80, 92, 153 N. W. 921. A guardian is not required in all cases to secure, before making a particular investment, an order from the court authorizing and directing him to do so; but he is answerable or not according to whether he did not or did first secure the order, in case the investment turns out to be disastrous.—*Mumford v. Rood*, 36 S. D. 80, 87, 153 N. W. 921. A guardian who has not, as a measure of self-protection, secured an order of court before making an investment of the ward's funds, is not protected subsequently by reason of the court's approving his annual reports; approval in such cases not being a ratification.—*Mumford v. Rood*, 36 S. D. 80, 87, 153 N. W. 921. Whether the funds in the hands of a guardian are sufficient to justify a prudent person in seeking an investment thereof is a question addressed to the sound discretion of the trial court, and his

finding thereon should not be disturbed on appeal, if it does not appear that such discretion was abused.—*Kerr v. Weathers*, 49 Okla. 574, 153 Pac. 866. A guardian is required to put on interest the moneys of his ward, unless the sum is so small that a prudent person would not seek an investment.—*Kerr v. Weathers*, 49 Okla. 574, 153 Pac. 866. An order of the court directing a guardian to invest funds belonging to one ward under his guardianship can afford him no protection if the funds he actually invests belong to other wards under his guardianship, whether his appointment as guardian was made in one or several proceedings.—*Pace v. Pace* (Okla.), 172 Pac. 1075, 1076. While a mere error of judgment will not subject a guardian to personal liability for the loss of his ward's funds, he is, nevertheless, held to the exercise of prudence and sound discretion in investing the same, and it is uniformly held that if he lends his ward's money without security, he assumes the entire risk, no matter what may have been the credit of the borrower.—*Corcoran v. Kostrometino* (Alaska), 164 Fed. 685, 687, 91 C. C. A. 619, 21 L. R. A. (N. S.) 399. An order of court authorizing the investment by a guardian of his ward's funds affords a guardian no protection from personal liability in case of loss, unless the order was made upon the notice required by the Oregon law in force in Alaska prior to the adoption of the Alaska Code.—*Corcoran v. Kostrometino* (Alaska), 164 Fed. 685, 687, 91 C. C. A. 619, 21 L. R. A. (N. S.) 399. A guardian, who, by mistake, invests the funds of three wards under his guardianship in the purchase of real estate in the name of a fourth ward, can not invoke the aid of equity to declare a trust in said real estate in favor of said three wards.—*Pace v. Pace* (Okla.), 172 Pac. 1075, 1076. Section 6569, Rev. Laws of Oklahoma, 1910, authorizes the county court to order the guardian to invest the proceeds of sales and any other of his ward's money, that he may have in his hands, in real estate, or make such other investment of it as may be most to the interest of all concerned.—*Yarritz v. Hopkins* (Okla.), 174 Pac. 257, 258. The county court, while having authority to order the guardian to invest the ward's money, has none to order him to mortgage property of the ward except in the cases specifically mentioned in section 6364, R. L. 1910.—*Yarritz v. Hopkins* (Okla.), 174 Pac. 257, 258. Where a guardian was required by order of court to invest funds of his ward in a real estate mortgage, a conversation of the judge of the court, presumably authorizing an investment of such funds in certificates of deposit can not be deemed a modification of the original order so as to justify the entry thereof nunc pro tunc, nor can such conversations relieve the guardian from the duty imposed upon him under such original order.—*In re Jiskra's Estate* (Wash.), 182 Pac. 961. Where a guardian was required by order of court to invest funds of his ward in a real estate mortgage, a subsequent order modifying such order by requiring such investment in interest bearing securities approved by the court did not change the requirements of the original order so as

to permit investment in a certificate of deposit, in the absence of an order approving such investment by the court, and such investment is held to have been at the risk of the guardian, who takes his chances, and loss, if any, must fall upon him.—*In re Jiskra's Estate* (Wash.), 182 Pac. 961. The approval by their guardian of an unauthorized investment of trust funds, constituting a breach of the trust, is not binding upon the minor cestuils que trust.—*International Trust Co. v. Preston*, 24 Wyo. 163, 180, 156 Pac. 1128.

#### 7. Sales of land.

(1) *in general*.—The sale of real estate is not one of the general duties of a guardian; and a ward can not, therefore, on obtaining his majority, maintain a suit against the guardian and the surety on his general bond to recover moneys received by the guardian on a sale of the ward's realty, and not accounted for, where the statute does not, in direct terms, require a condition in the general bond to account for the proceeds of such sales.—*Henderson v. Coover*, 4 Nev. 429, 433, 434. A guardian can not sell his ward's property without an order of court, and this includes personal property.—*Kendall v. Miller*, 9 Cal. 591; *De la Montagnie v. Union Ins. Co.*, 42 Cal. 290, 293. Every alienation of the property of the ward, if made by the guardian without order of court, is void.—*De la Montagnie v. Union Ins. Co.*, 42 Cal. 290, 293. If a guardian, however, is authorized by an act of the legislature to sell his ward's real estate, subject to approval by the court, his sale thereof, under such authority, is valid; but he has no authority to accept anything but money in payment of the purchase price.—*Brenham v. Davidson*, 51 Cal. 352, 356. To make a valid sale in pursuance of such authority, the person making it must first have received an appointment as guardian by the probate court in accordance with the general statutes upon that subject; otherwise the sale is void.—*Paty v. Smith*, 50 Cal. 153, 158. A proceeding for the sale of land by a guardian is in the nature of a proceeding in rem.—*Gager v. Henry*, 5 Saw. 237, Fed. Cas., No. 5172. The parent of a minor has no authority, as his natural guardian, to transfer his real property.—*McNeil v. First Cong. Soc.*, 66 Cal. 105, 4 Pac. 1096, 1099. A guardian may, upon order of the court, sell his ward's real estate for the purpose of paying the debts and expenses of the guardianship.—*Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888, 890. The power to sell the real estate of a minor is statutory, and a substantial compliance with the requirements of the statute is necessary to divest the minor of his title, and this must be affirmatively shown by the record.—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, 111. Title to a ward's land passes by the guardian's deed therefor, and not by the confirmation of the sale.—*Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324, 327. In determining whether the real or personal estate should be sold, the court should ordinarily be governed by the same reasons which would influence a



competent adult in disposing of his own property. A determination of what is for the best interest of the ward must control. A probate homestead which has been set aside to a surviving wife and children, under order of court, may be sold, and a good title to the interest of the minors passed, where the adult heirs have all concurred in the sale, if such sale is deemed by the court to be advantageous to the estate of the minors.—*Estate of Hamilton*, 120 Cal. 421, 52 Pac. 708, 709, 710. The probate courts of New Mexico have jurisdiction to make an order appointing a special guardian to sell the undivided interest of minor heirs in certain lands owned by their deceased father, for the benefit of said heirs, and a conveyance by the special guardian, made under authority of such order, is not void.—*Hagerman v. Meeks*, 13 N. M. 565, 86 Pac. 801, 802. An agent of the guardian of an infant owner of real estate has no power to make an executory contract for the sale of the infant's real estate. Such a sale can only be made upon an order of the probate court, and subject to the court's approval.—*Gault Lumber Co. v. Pyles*, 19 Okla. 445, 92 Pac. 175. The guardian of a minor ward has, in general, no authority to sell the ward's estate, unless authorized by a competent court; nor has he authority to sell at will the personal estate of his ward.—*Washabaugh v. Hall*, 4 S. D. 168, 56 N. W. 82. There is a distinction to be observed between sales by guardians and sales by executors or administrators. A sale by a guardian is authorized, either when necessary to maintain or educate the ward, or when expedient for the purpose of a profitable investment of the proceeds, but no sale of a decedent's estate by an executor or administrator is authorized except when it is "necessary" to pay: 1. Family allowances; 2. Debts of the decedent; 3. Expense of administration; 4. Legacies.—*Smith v. Biscalluz*, 83 Cal. 344, 349, 21 Pac. 15, 23 Pac. 314. When it is necessary for a guardian to apply for an order of court allowing him to sell the property of his ward, the procedure shall be the same as in the case of an administrator applying to sell the property of his decedent; but the statute does not require the guardian to apply for such an order in every case.—*Bank of Welch v. Cabell*, 52 Okla. 190, 152 Pac. 844. The ward's interest in a homestead may be sold by his guardian under order of court, and a good title to the minor's interest passed.—*Hartsog v. Berry*, 45 Okla. 140, 145 Pac. 328. A sale of real estate by a guardian under the order and subject to confirmation by the probate court is a judicial sale, and the purchaser at such sale takes only such title as is the ward's at the time.—*In re Standwaitie's Estate* (Okla.), 175 Pac. 542.

(2) *Petition for.*—In order to render a guardian's sale effectual to confer a valid title, the probate court must have acquired jurisdiction of the case by the presentation of a proper petition by the guardian. What shall be the contents of such a petition is prescribed by the statute, and the petition should be in substantial conformity with its requirements.—*Fitch v. Miller*, 20 Cal. 352, 381. The petition must

set forth the condition of the estate of the ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of the sale, and the petition must be verified by the oath of the petitioner.—*Fitch v. Miller*, 20 Cal. 352, 381. The necessity or expediency of the sale must arise from one or more of these circumstances: 1. The evidence of debts due from the ward, which can not be paid out of his personal estate and the income of his real estate. 2. The insufficiency of the income of the estate of the ward to maintain the ward and his family, or to educate his family, or to educate him when a minor. 3. That it would be for the benefit of the ward that his real estate, or a part thereof, should be sold, and the proceeds put out on interest, or invested in some productive stock. In order to enable the court to judge of this necessity or expediency, the first requisite of the petition is that it shall set forth the condition of the estate, but the statute does not require that it shall designate the value of the several items and parcels of property of which the estate consists; it is necessary only to state the condition in such manner as to enable the court to judge of the existence of one or more of the circumstances above specified, rendering a sale necessary or expedient.—*Fitch v. Miller*, 20 Cal. 352, 382. If the sale is asked upon the ground that it is "necessary," there is the same reason for requiring a statement of the condition of the ward's whole estate as exists in the ordinary case of a sale by an executor or administrator; namely, to enable the court to decide what particular part it is best to sell. But if the sale is asked upon the ground that it is for the "interest" of the ward that some portion of his lands should be sold and the proceeds invested, it is manifest that the condition of the property to be sold is the only matter to be inquired into, and that the policy or expediency of selling it is in no wise affected by the condition of other portions of his estate. The beginning and the end of inquiry in such case is, whether the price of the land to be sold can be invested to better advantage in something else; and a petition which fairly presents this question ought to be sufficient to give the court jurisdiction to make the order of sale, as it is by express enactment in the case of mining claims belonging to the estates of decedents.—*Smith v. Biscailuz*, 83 Cal. 344, 350, 21 Pac. 15, 23 Pac. 314. A petition by guardian to sell his ward's realty is not a proceeding adverse to the ward, or to his relatives, but is in rem.—*Gager v. Henry*, 5 Saw. 237, Fed. Cas. No. 5172; *Holmes v. Oregon*, etc., R. R. Co., 7 Saw. 380, 9 Fed. 229. A guardian's petition for the sale of his ward's estate is sufficient to give the court jurisdiction, if it states "any cause" which, under the law, would have authorized the court to make a sale.—*Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537, 554. Although the petition and order to show cause may contain a defective description of the lands to be sold, this does not affect the jurisdiction of the court or the validity of the sale, where the order of sale contains a specific and correct descrip-

tion of the land.—*Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324, 327. It is not a condition precedent to the exercise of the power to sell the ward's real estate for the purpose of reinvesting the proceeds of unproductive land, which is depreciating in value, in more desirable property, that the guardian shall have "faithfully applied all the personal estate." The want of such an allegation constitutes no defect in the petition.—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, 111. Whether the real or personal estate of the ward shall be sold is in the discretion of the court. A determination of what is for the best interest of the ward must control; and it is not required that the petition should show the amount of personal estate and how much remains undisposed of, as such a provision relates to sales by executors or administrators, and not to sales by guardians.—*Estate of Hamilton*, 120 Cal. 421, 424, 52 Pac. 708. A petition of a guardian for an order of sale of his ward's real estate must be filed in the county court of the county in which he was appointed guardian; but the petition is not required to show affirmatively that the ward resides in the county where it is filed, in order to give the court jurisdiction.—*Eaves v. Mullen*, 25 Okla. 679, 107 Pac. 433. A guardian's petition for leave to sell need not set out in other than a general way the condition of the ward's estate and needs to set out no more than one of the statutory grounds for allowing the sale to be made.—*Pyeatt v. Estus* (Okla.), 179 Pac. 42, 45. Under the Oklahoma statutes the petition of a guardian to sell the real estate belonging to his ward must state the condition of the estate, and facts tending to show the expediency or necessity of such sale, in order to give the court jurisdiction to order the sale.—*Sockey v. Winstock*, 43 Okla. 758, 760, 144 Pac. 372. The petition of the guardian to sell the real estate of his ward is examined, and it is held that the facts are set forth substantially in accordance with the requirements of the statute, and that it was sufficient to confer jurisdiction upon the court.—*Sockey v. Winstock*, 43 Okla. 758, 761, 144 Pac. 372.

#### REFERENCES.

Sale of property of minors, and disposition of the proceeds. See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 777-792. What petition for sale of ward's real estate must contain.—See *Sprigg v. Stump*, 7 Saw. 280, 8 Fed. 207.

(3) Notice. Publication.—A probate sale of real estate is not valid unless notice was properly given.—*Gager v. Henry*, 5 Saw. 237, Fed. Cas. No. 5172. A guardian's sale of his ward's realty is void, unless it appears that the same was made after due notice of the time and place thereof.—*Hobart v. Upton*, 2 Saw. 302, Fed. Cas. No. 6548. The notice required by the statute to be given to a ward of the hearing of his guardian's application for leave to sell his real estate is jurisdictional, and a deed made without such notice having been given is void, and subject to collateral attack.—*Beachy v. Shomber*, 73

Kan. 62, 84 Pac. 547. But a failure to give the three weeks' notice by publication required by statute is held, in Colorado, not to be a jurisdictional defect such as to render the judgment subject to collateral attack.—*Mortgage Trust Co. v. Redd*, 38 Colo. 458, 120 Am. St. Rep. 132, 8 L. R. A. (N. S.) 1215, 88 Pac. 473, 475. In the matter of the sale of the land of minors upon the application of a guardian, it is competent for the probate court to determine from the evidence submitted whether due and legal notice has been given to the minors.—*Bradford v. Larkin*, 57 Kan. 90, 45 Pac. 69, 70, holding, in the case involved, that the notice was sufficient to confer jurisdiction upon the probate court, and that the proceedings were not void. Where the petition and the notice for the sale by a guardian of his ward's real estate are each signed by the guardian and served upon the minor by an individual who is not an officer, and the proof of the service is shown by the affidavit of the person who served the same, and all were filed in the probate judge's office, and the probate judge, as well as the district court, found that the service was sufficient, the supreme court must also consider it sufficient, especially where the service is attacked only in a collateral proceeding.—*Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116, 117. Under a statute which requires a publication of the notice of sale of real property "for four weeks successively," it is not necessary that proof of notice should show that the notice was given for four weeks "next preceding the sale."—*Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537, 555. An order of sale by a guardian on May 11th, notice to be first published at least once a week for three consecutive weeks in a newspaper, is complied with by publishing the notice in each issue of a daily paper commencing on April 21st and including May 11th, a period of twenty days. It was not essential that the notice should have been published for the full period of three weeks before the sale.—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, 112; following *Calvert v. Calvert*, 15 Colo. 390, 24 Pac. 1043. If an order to show cause why an order of sale of certain personal and real property of a minor should not be granted is published three weeks, in precise accordance with the statute, such publication is sufficient.—*Estate of Hamilton*, 120 Cal. 421, 425, 52 Pac. 708. There is no requirement of statute in the state of Oklahoma that notice shall be given by a guardian of his intended application for an order of sale of his ward's real estate.—*Spade v. Martin*, 28 Okla. 384, 114 Pac. 724.

(4) Additional bond.—Though the statute requires a bond of the guardian before making a sale of his ward's estate, the fact that the bond was not filed until after a sale was made is not a valid objection to the validity of the sale, where it appears, by recital in the decree of sale, that, before making it, the guardian, as required in and by the order of sale, duly executed an additional bond to the state. Such bond could not have been "duly executed" unless it had been delivered to the judge, and all other acts performed which

the statute required; and if delivered to the judge and approved, that was sufficient filing.—*Smith v. Biscailuz*, 83 Cal. 344, 358, 21 Pac. 15, 23 Pac. 314. If the court's order did not, in terms, require the guardian to give bond, or to take an oath of office, and neither is found, but the record does not show that they were not given, the presumption, in support of a judgment adjudging a sale of the infant's property, is, that the guardian qualified as such.—*Braly v. Reese*, 51 Cal. 447. See *Goldsmith v. Gilliland*, 10 Saw. 606, 23 Fed. 645. The fact that a guardian did not give a bond for the faithful application of the proceeds of the sale is without merit, where it appears that the terms of the sale were complied with.—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, 113. The omission of the court to require, and of the guardian to give, a special sale bond is a mere irregularity which does not affect or impair the jurisdiction of the court which ordered and affirmed the sale, where the statute does not declare that if a special bond be not given, a guardian's sale shall not be made, or that, if made, it shall be void, and where it does not provide that the order of sale shall become effective only when such special bond is given. The general bond of the guardian stands as security for the proper application of the proceeds of the sale.—*Hughes v. Goodale*, 26 Mont. 93, 91 Am. St. Rep. 410, 66 Pac. 702, 705. The sureties on a guardian's bond, conditioned that he shall "faithfully execute the duties of his trust according to law" in selling the real estate of his ward, are liable on such special bond, though they might not be liable on the bond given for the general administration of his ward's estate.—*Botkin v. Kleinschmidt*, 21 Mont. 1, 69 Am. St. Rep. 641, 52 Pac. 563, 564. The failure of a guardian to file the additional sales bond required to be filed prior to the sale of his ward's lands under an order of court, is not jurisdictional, and the failure to file such bond is a mere irregularity.—*Carolina v. Montgomery (Okla.)*, 177 Pac. 612, 613. A bond of a guardian authorized to sell real estate, conditioned that the guardian "shall faithfully execute the duties of her trust according to law," substantially complies with the statute and the fact that the bond runs to the State of Oklahoma instead of to the "county judge," as the statute requires, does not impair its validity as a statutory bond.—*Rice v. Theimer*, 45 Okla. 618, 629, 146 Pac. 702. The sureties on a guardian's additional bond for the sale of real estate are not answerable for misappropriation by the guardian of funds not arising from the sale of real estate in relation to which the bond was executed.—*National Surety Co. v. Washington (Okla.)*, 170 Pac. 1142.

(5) Jurisdiction and supervision of court.—A "minor," within the meaning of section 6 of the act of congress, approved May 27, 1908, includes males under the age of 21 years, and females under the age of 18 years, and the marriage of such a minor does not confer upon him or her the authority to sell his or her allotted lands independent of the jurisdiction and supervision of the probate courts of the state.

—*Mortgage & Debenture Co. v. Burrows* (Okla.), 182 Pac. 238. If the petition of a guardian asking for an order to sell real estate belonging to his ward is filed with the county court and contains allegations substantially in compliance with the provisions of the statute, that court acquires jurisdiction to make the order; and, notwithstanding the proceedings may be irregular, the judgment rendered will not be void and subject to collateral attack.—*Drennan v. Harris* (Okla.), 161 Pac. 781. The county court of Oklahoma, having acquired jurisdiction of the estate of a minor, may order the sale of lands of said minor lying and situated in another county in the state.—*Dewalt v. Cline*, 35 Okla. 197, 128 Pac. 121; *Klaus v. Campbell-Ratcliff Land Co.*, 48 Okla. 648, 150 Pac. 676. It may also confirm the sale, and order a guardian's deed to be made accordingly.—*Dewalt v. Cline*, 35 Okla. 197, 128 Pac. 121. A probate court is powerless to divest minors of their title to real estate, except through a guardian duly appointed and in accordance with the statute.—*Harrison v. Miller*, 87 Kan. 48, 123 Pac. 854. County courts in Oklahoma should see to it, in all cases where real estate of a ward is sold for a specific purpose, that the money be paid into the guardian's hands before they issue orders confirming the sales.—*Harris v. Wilcox* (Okla.), 175 Pac. 352.

(6) *Order for.*—Where the statute provides that the order of sale must describe the lands to be sold, the order of sale must be, in itself, sufficient; and, to make it so, the description of the land to be sold must be sufficiently definite and certain, without referring to any extraneous matter, and the order can not be helped out by referring to a doctrine not found in it.—*Hill v. Wall*, 66 Cal. 130, 132, 4 Pac. 1139. But the order of sale need not state the conclusions of the court as to the advisability of the sale.—*Gager v. Henry*, 5 Saw. 237, Fed. Cas. No. 5172. When the statute with reference to what the decree must contain in order to validate the sale by a guardian (notwithstanding the failure of the petition to state the condition of the estate, and the facts and circumstances going to show a sale to be necessary or expedient), provides that a failure to set out those facts and circumstances in the petition shall not invalidate the sale, if the decree contains a recital of "general facts" showing such necessity, it means to declare that neither the failure to set out the special facts and circumstances which, taken together, show the necessity or expediency of the sale, nor the failure to state the condition (which appears of necessity from, and is a part of, the special facts and circumstances showing the necessity or expediency of a sale), shall invalidate the sale if the decree shall recite the "general facts" above stated. Such "general facts" mean those ultimate facts showing one or more of the contingencies under which the real estate of the minor may be sold by the guardian, and which must appear in some form in the petition therefor to give the court jurisdiction.—*Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, 17, 23 Pac. 344, 356. Under a statute concerning the sale of a ward's real estate, and which requires

a copy of the order to show cause to be personally served on the next of kin of the ward, or that it must be published, etc., it is not necessary that the order shall be served on the ward, because the minor is in court by the filing of the petition, and submits his property to the jurisdiction and order of the court.—*Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324, 326. Proceedings pertaining to a guardian's sale of the real estate of his ward contemplate a case where there is a living ward,—a living ward not only when the proceedings are inaugurated, but up to and including the moment the deed is made. Hence if the ward dies before his guardian has filed an account, and the probate court decrees that the ward's estate is indebted to the guardian, an order authorizing the guardian to sell his ward's real estate for such debt is invalid, because the guardian's authority expired on the death of the ward.—*Estate of Livermore*, 132 Cal. 99, 84 Am. St. Rep. 37, 64 Pac. 113. An order directing the sale of certain personal and real property of a minor "for cash" sufficiently fixes the terms of the sale.—*Estate of Hamilton*, 120 Cal. 421, 425, 52 Pac. 708. It is the duty of a guardian to pay all just debts of the ward out of his personal estate and the income of his real estate; and when a sale of the property of the ward is necessary to pay the debts and expenses of guardianship, the guardian may, upon an order of the court, sell the ward's real estate for that purpose.—*Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888. Where a probate homestead has been set apart for the use of the widow and minor children, the guardian may, under proper proceedings had in the probate court, in the matter of the estate of such minors, obtain an order for the sale of their interests in such homestead during their minority.—*Estate of Hamilton*, 120 Cal. 421, 428, 52 Pac. 708. Under the statute of Kansas, providing that a guardian can sell his ward's real estate only upon the order of the probate court, a guardian's contract for the conveyance of his ward's land has no legal standing until approved by the probate court.—*Nichols v. Bryden*, 86 Kan. 941, 122 Pac. 1119. Where on an attempted appeal from an order of sale of a minor's land, a notice and bond are filed, but no affidavit of interest as required by statute, held: such affidavit is a prerequisite to the granting of an appeal from such an order of the county court, and essential not only to the jurisdiction of the court allowing it, but to the jurisdiction of the district court to entertain it.—*Baker v. Cureton*, 49 Okla. 15, 150 Pac. 1090, 1092.

#### REFERENCES.

Order of sale must contain what.—See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1544.

(7) Manner and mode of sale.—Guardians are required to proceed in the matter of sales, like executors and administrators, whose duties in that respect are prescribed by the statute.—*Seidel's Estate*, In re, 64 Or. 321, 324, 130 Pac. 53. The mode of a guardian's sale in Okla-

homa of his ward's real estate is pointed out by express statute, and can not be made without an order of the probate court; when made it must be reported to the county court and be confirmed by it; otherwise, no title can pass to the purchaser; the order of sale is merely interlocutory, made in the course of judicial proceedings, and the final order is that of confirmation after the sale is made; the order of sale and the order of confirmation are both judicial acts; and these two orders concurring make the sale a judicial sale.—*Drennan v. Harris* (Okla.), 161 Pac. 781. A guardian's sale of his ward's real estate must, since 1912, conform to the law passed in that year relative to probate courts, whether the ward be white or Indian.—*McCoy v. Mayo* (Okla.), 174 Pac. 491, 494. The authority of the guardian to sell and convey his ward's real estate rests entirely upon the statutes, and such a sale can not be made except for the purposes and upon the terms and conditions prescribed by the statutes.—*Perkins v. Middleton* (Okla.), 166 Pac. 1104, 1106. A guardian's sale of a minor's real estate, made in 1912, whether such minor be an Indian or not, could only be made in conformity with the laws of Oklahoma, and such a sale made in 1912, without such compliance is absolutely void, notwithstanding its approval by the county court having jurisdiction of such minor's estate.—*McCoy v. Mayo* (Okla.), 174 Pac. 491, 494. A sale of a minor's interest in real estate made in 1912, without complying with the laws of Oklahoma, is a nullity, notwithstanding the fact that such minor was an Indian, and his guardian joined with an adult heir of such real estate as provided by the act of congress of 1906.—*McCoy v. Mayo* (Okla.), 174 Pac. 491, 494. The statutes of Oklahoma do not authorize the sale by a guardian of his ward's real estate in exchange for other lands, with or without the consent of the county court.—*Perkins v. Middleton* (Okla.), 166 Pac. 1104, 1106. No authority can be found in the statutes of Oklahoma for the sale by a guardian of his ward's real estate for anything but money, cash or deferred payments.—*Perkins v. Middleton* (Okla.), 166 Pac. 1104, 1107. A sale of a minor's real estate under an order of the county court, for part cash and part by the conveyance of property, is absolutely beyond the jurisdiction of such court, and the sale is void, notwithstanding it is made in other respects in conformity with the probate laws of the state.—*McCoy v. Mayo* (Okla.), 174 Pac. 491, 494. A sale by a guardian of his ward's real estate, made ostensibly for cash, but under circumstances which constitute an indirect exchange for other property, although approved by the county court, and although the proceedings appear on the face of the record regular, constitutes constructive fraud upon the estate of the ward.—*Perkins v. Middleton* (Okla.), 166 Pac. 1104, 1107. Where the probate proceedings are regular on the face of the record, and the guardian's sale of the land of his ward was apparently for cash, and the purchaser executes a mortgage upon the same, the lien of the mortgagee will not be defeated on proof that the sale was not made for cash, but by an exchange of other real estate,



where he did not participate in the fraud and did not have notice sufficient to put him on inquiry.—*Berry v. Tolleson* (Okla.), 172 Pac. 630, 631. Where property of a minor is sold by a guardian partly on time and partly on deferred payments, the deferred payments must be secured by a first lien on the land, together with such other security as the court may deem sufficient.—*American Inv. Co. v. Brewer* (Okla.), 181 Pac. 294, 295. A guardian can not directly or indirectly purchase any property belonging to the estate of his ward, nor must he be interested in any sale thereof.—*Allison v. Chummev* (Okla.), 166 Pac. 691, 693; *Winsted v. Shank* (Okla.), 173 Pac. 1041. Section 215 of the probate code was passed after the guardianship sale was made in this case, and there is nothing in the section indicative of a purpose to give it a retroactive effect; it does not affect the fatal defect in the sale under consideration.—*Vanhorn v. Nestoss*, 99 Wash. 328, 337, 169 Pac. 807.

(8) *Validity of.*—Where a proceeding by a guardian for the purpose of selling his ward's estate is not adverse to the latter's interest, and where there is no statute making the appointment of a guardian *ad litem* a requisite to the validity of the sale, no such appointment is necessary.—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, 112. Where it is apparent that an appraisement of real estate was filed in court before the confirmation of sale, the marking of it "filed," by the clerk, is not essential to its validity.—*Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, 18. And an ambiguous report of appraisers, made in the course of proceedings upon which a guardian's deed is based, will, if possible, be given a construction that will uphold the deeds.—*Beachy v. Shomber*, 73 Kan. 62, 84 Pac. 547. The title to land of the ward passes by his guardian's deed therefor, and not by the confirmation of the sale.—*Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324, 327. A guardian's sale of his ward's land is valid, though the order of sale was erroneous, as having been made twenty-three days after the order to show cause, while there should not have been less than four weeks or twenty-eight days intervening. Such an order is clearly erroneous; but if the court acquired jurisdiction when the petition was presented, and if the proceeding is not adverse to the ward, such error or irregularity does not vitiate the sale.—*Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324, 325. Where there is a matter of substance upon which jurisdiction can hinge, mere errors or defects in a guardian's sale of his ward's land, although material in some respects, but which might have been avoided upon appeal, can not avail to condemn the proceeding, when, by lapse of time, an appeal is barred, and which proceeding has become the foundation of title to property.—*Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537, 555. Where a sale of the land of minors was duly made by a guardian for the actual value of the same, the sale approved, the money paid, and expended for the support and education of the minor, and the purchaser takes possession thereunder, and holds the same for a long time, he acquires the full,

equitable title, and is entitled to a conveyance of the legal title; and the mere fact that a deed which contains a full recital of the preliminary proceedings omits the name of one of the minors will not invalidate the sale, and in such case the purchaser or his grantee is entitled to have his estate, interest, and possession of the land quieted as against the claim of any of the minors.—*Bradford v. Larkin*, 57 Kan. 90, 45 Pac. 69. So where it appears by the record that the notice describing the land sold was published the required length of time, the fact that the petition presented to the court included other tracts described in another notice not so published, which were not sold, does not affect the validity of the sale of the land properly advertised. Even under an order of sale valid as to all the land described therein, we apprehend that a failure from any cause to sell the entire property would not vitiate the sale of a portion, much less should a failure to sell that illegally ordered sold have such an effect.—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, 112. And the failure of the guardian to give security required by the statute relating to guardians and wards will not render void a sale regularly made and approved.—*Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116. The conveyance of a ward's land, by the guardian, for the furtherance of a public use, as where it has been conveyed to a railroad, is valid, where the deed is in proper form to convey the estate, and the probate judge has found that it was a case within the statute, and has approved the sale, and where the only limitation upon the sale is that it shall be approved and confirmed by the probate judge.—*Hodgdon v. Southern Pac. R. R. Co.*, 75 Cal. 642, 17 Pac. 928, 931. Mere irregularities of proceedings in a guardian's sale, though of so grave a character as to render the sale inoperative, may be deprived of their evil consequences by subsequent legislation.—*McCulloch v. Estes*, 20 Or. 349, 25 Pac. 724; 725. It is a well-recognized rule of law that the legislature may, unless prohibited by the constitution, validate or legalize, retrospectively, judicial or execution sales, even though the defects or irregularities therein are of so grave a character as to render them inoperative, so long as it does not undertake to infuse life into proceedings utterly void for want of jurisdiction. Thus the selection of the time and place of sale by a guardian, in advance of taking the prescribed oath, is, under the decisions, fatal to the purchaser's title; but the defect or irregularity may be cured, and the sale validated, by subsequent curative act of the legislature.—*Fuller v. Hager*, 47 Or. 242, 114 Am. St. Rep. 916, 83 Pac. 782, 783. If shares of stock in an insurance company belong to an infant, but are issued to his guardian, who afterwards, without any order of court, sells and assigns the same, such sale is void, and gives no title to the purchaser.—*De la Montagnie v. Union Ins. Co.*, 42 Cal. 290. A guardian's sale is presumed to have been regular and according to law, though the record does not show the particular proceedings taken, except as to the particulars mentioned in the statute. The statutory proceedings for the sale of property by guardians must, however, appear of record, or the

sale is invalid and void.—*Hobart v. Upton*, 2 Saw. 302, Fed. Cas. No. 6548; *Gager v. Henry*, 5 Saw. 237, Fed. Cas. No. 5172; *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537, 540. A guardian's sale of his ward's real estate is valid if notice was properly given.—*Gager v. Henry*, 5 Saw. 237, Fed. Cas. No. 5172. But such sale is void unless it appears that it was made at public auction, after due notice of the time and place thereof, when a sale at public auction is required by the statute.—*Hobart v. Upton*, 2 Saw. 302, Fed. Cas. No. 6548. Where the probate court of Elk County, in Kansas, issued letters of guardianship appointing a guardian of the person and estate of a minor whose domicile was in Greenwood County, and, upon application, made its order directing a sale of the minor's interest in real estate situated in said county of Elk, it was held, in an action of partition in the district court of Elk County, by the guardian of said minor, subsequently appointed by the probate court of Greenwood County, that the proceedings in the Elk County probate court and the guardian's deed were void as against the purchaser at such guardian's sale, and also void as against his grantee, claiming under said guardian's deed.—*Connell v. Moore*, 70 Kan. 88, 109 Am. St. Rep. 408, 78 Pac. 164. An administrator or guardian is prohibited from purchasing trust property at his own sale, and a sale by him to another, who does not pay any consideration, and who immediately transfers the property to the administrator or guardian, is void, and as much a violation of the fiduciary relation, and as great a fraud in the eye of the law, as if the sale had been made directly to himself.—*Webb v. Branner*, 59 Kan. 190, 52 Pac. 429. A guardian's sale of her infant wards' interest in real estate may be specifically enforced at the suit of the infants brought by them through their guardian and next friend, the title of the purchaser will be good, and by virtue of the decree of specific performance all doubt respecting the marketability of the title will be removed.—*Grey v. Hansow*, 86 Kan. 933, 122 Pac. 879.

(9) Same. Indian lands.—An Indian minor is legally incompetent, in Oklahoma, to execute a conveyance of allotted lands inherited by him, except pursuant to an order of the county court having jurisdiction; the district court is, therefore, without jurisdiction to give validity to a void conveyance executed by such minor; and a decree of the district court in an action between the minor and his grantee, quieting title in such grantee, being void for want of jurisdiction, does not divest such minor of his title.—*Crow v. Hardridge* (Okla.), 175 Pac. 115. A conveyance, in 1907, by the full-blood heir of a Mississippi Choctaw Indian, who died in 1903, was void where it was not approved by the Secretary of the Interior, and after the act of May 27, 1908, such a conveyance was void unless it was approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee.—*Sampson v. Smith* (Okla.), 166 Pac. 422. A part Indian who, as a minor, executed a deed during his minority may, on reaching lawful age, validate the conveyance by executing a new deed.—*Grabbs v.*

Thompson (Okla.), 178 Pac. 684, 687. The deed of a minor Cherokee freedman, attempting to convey his allotted lands, is void; such lands can be sold only by guardian in a proper proceeding in the county court.—Reid v. Taylor, 43 Okla. 816, 144 Pac. 589. The marriage of a minor Cherokee Indian does not confer upon him the authority to sell his allotted lands independent of the supervision of the county courts of the state.—Jefferson v. Winkler, 26 Okla. 653, 128 Pac. 755; Klaus v. Campbell-Ratcliff Land Co., 48 Okla. 648, 150 Pac. 676. The deed of an Indian allottee, executed during his minority, and not by a guardian acting under the authority of the court having jurisdiction, is void.—Barbre v. Hood (Okla.), 228 Fed. 658, 661, 143 C. C. A. 180. A deed of lands that have been allotted to Indian minors in Oklahoma is void, under the act of May 27, 1908, unless executed under authority of the probate court having jurisdiction.—Etchen v. Cheney (Okla.), 235 Fed. 104, 105, 148 C. C. A. 598. A minor allottee of the Five Civilized Tribes is not bound by a contract entered into by him during his minority, and affecting his allotted lands or the proceeds derived therefrom.—Southern Surety Co. v. Lephew (Okla.), 173 Pac. 438. Though an adult freedman of the Cherokee Nation, having the right to select tribal lands, made such a selection on false testimony, and made a conveyance of his allotment, the grantee took good title, although he knew about the fraud; the allotment certificate was conclusive evidence of the allottee's right to the land; and his relinquishment of the allotment, in a contest of it, did not affect the rights of the grantee, where the latter was not a party to such proceeding.—United States v. Whitmire (Okla.), 236 Fed. 474, 149 C. C. A. 526. Signing by a minor jointly with an adult heir, Indians, of a deed conveying property in which both are interested no longer need be done by the guardian, the act of congress of 1906, having been repealed in 1908.—McCoy v. Mayo (Okla.), 174 Pac. 491, 494. The guardian and mother of two Cherokee minor children made, under section 22 of the act of congress approved April 26, 1906, application to the proper court for an order to sell to the proposed purchaser of the mother's interest, the undivided interest of her minor children and wards in the lands, by filing in the court her petition, setting up the price offered and her contract to sell her interest to him, and introduced evidence to establish that the price offered was a fair market price. The court made an order directing the sale and directed the guardian to convey to the purchaser of her interest the interests of her wards and to execute therefor her deed as guardian and upon report thereof made by the guardian the sale was approved and was held to be a substantial compliance with said section 22, supra.—Wilson v. Morton, 29 Okla. 745, 119 Pac. 213. A deed by an Indian, of land granted to him by the government and subject to the law restricting alienation, is void, if made before the period of restriction has expired.—Robinson v. Steele, 91 Wash. 268, 157 Pac. 845.

(10) Resale.—Under section 6388, Rev. Laws of Oklahoma, 1910, where the purchaser at a guardian's sale fails to comply with the

terms of the sale, the court may, after notice to the purchaser, order a resale to be made.—*Morris v. Sweeney*, 53 Okla. 163, 155 Pac. 537. Where the purchaser at a guardian's sale fails to comply with the terms of the sale, the court may, after notice to the purchaser, order a resale to be made of the property.—*Morris v. Sweeney*, 53 Okla. 163, 155 Pac. 537. Where the purchaser at a guardian's sale fails to comply with its terms and the court, under the statute, sets aside an order of confirmation and orders a resale of the ward's property, all persons thereafter dealing with the property are charged with notice of such orders.—*Morris v. Sweeney*, 53 Okla. 163, 155 Pac. 537; *Coleman v. Sweeney*, 56 Okla. 355, 156 Pac. 239. Under section 5323, Comp. Laws of Oklahoma, 1909, where upon a hearing on return of sale, an advance bid of 10 per cent is made to the court in writing by a responsible person, the court is not limited to the alternative of accepting the first offer that may be made, or ordering a new sale, but should receive as many bids as may be made, and upon a consideration of all the bids, determine whether to accept the highest bid submitted by a responsible bidder or order a new sale.—*In re Bohanan*, 37 Okla. 560, 133 Pac. 189.

(11) Confirmation.—A return must be made within ten days after a guardian's sale, and fifteen days from the filing of the return are allowed for urging objections against the confirmation of the sale.—*Seidel's Estate, In re*, 64 Or. 321, 324, 130 Pac. 53. The purpose of the action, required by statute to be given to the purchaser preliminary to the hearing on a motion to set aside a confirmation of guardian's sale, was to prevent an undue advantage being taken of a purchaser at such sale and give him an opportunity to be heard before any action is taken for the purpose of fixing liability on him for his delinquency in refusing to make good his bid.—*Brown v. Thompson (Okla.)*, 175 Pac. 731. The judgment of a county court in confirming a guardian's sale of real estate will be accorded like force, effect, and legal presumption as the judgments and decrees of other courts of general jurisdiction.—*Berry v. Tolleson (Okla.)*, 172 Pac. 630, 631. After a court obtains jurisdiction of a guardianship sale proceeding, all irregularities and defects between the acquisition of jurisdiction and the order of confirmation are cured by the order of confirmation, to the extent that the order of confirmation may not be collaterally attacked on account of such irregularities, but this rule does not extend to jurisdictional matters.—*Winters v. Oklahoma P. C. Co. (Okla.)*, 164 Pac. 965. Where a foreign guardian has, under authority of the county court, sold the lands of her ward in this state, and the county court has rendered a decree of confirmation, which is not assailed by appeal or by an original suit in equity to set it aside, such decree can not be overturned by motion.—*Seidel's Estate, In re*, 64 Or. 321, 324, 130 Pac. 53. The terms of sale, under which one becomes purchaser at a guardian's sale of his ward's property, are such as are contained in the order of sale and the order of confirmation; and if the guardian makes promises in

that connection not so contained, the purchaser should, for his protection, consult the court before the order of confirmation is made.—*Brown v. Thompson* (Okla.), 175 Pac. 931, 933. That provision of the statute which prohibits a private guardianship sale of lands from being confirmed where the bid is not 90 per cent. of the appraised value, or where there has been no appraisal of such lands within a year prior to the sale, is mandatory and goes to the jurisdiction of the court to make the order of confirmation; an order of confirmation of such a sale, made in violation of such a statutory provision, is void for want of jurisdiction.—*Winters v. Oklahoma P. C. Co.* (Okla.), 164 Pac. 965; *Sampson v. Smith* (Okla.), 166 Pac. 422. An appeal may be taken, under the Oklahoma statute, by the purchaser at a guardian's sale from the county court to the district court from an order refusing to confirm the sale.—*In re Billy*, 34 Okla. 120, 124 Pac. 608. A purchaser at a guardian's sale who, after confirmation of the sale refuses to comply with the terms, is entitled to no particular form of notice of a purposed motion to have the order of confirmation vacated and a resale ordered; provided, the notice received by him distinctly sets out the land, the place and hour of hearing, and the nature of the proceedings, is authenticated by the clerk of court under his seal, and is served by the sheriff of his own county.—*Brown v. Thompson* (Okla.), 175 Pac. 931, 933.

(12) *Purchaser and his rights.*—A guardian, like an administrator, is prohibited from purchasing trust property at his own sale.—*Webb v. Branner*, 59 Kan. 190, 52 Pac. 429. Since, under the law of this state, the wife's interest during marriage in the real estate of her husband, while a contingent one, is unquestionably property, the statutory incapacity of a guardian to become a purchaser at the sale of his ward's property is held to exclude the husband of a guardian from becoming such a purchaser.—*Frazier v. Jeakins*, 10 Kan. App. 558, 63 Pac. 459. If a guardian, or the husband or wife of such guardian, wishes to buy at the guardian's sale, the proper practice is to obtain leave of court to do so, on a showing of reasons therefor.—*Frazier v. Jeakins*, 64 Kan. 615, 57 L. R. A. 575, 68 Pac. 24. Where a probate homestead has been set apart by the court from community property, for the use of the surviving wife and minor children, it belongs, one-half to the widow, and the remainder, in equal shares, to the children. The widow, and children upon attaining majority, may dispose of their respective interests in such homestead, and during their minority the children's interests may be sold by the guardian, but the purchaser, where he was not misled, and did not misunderstand the terms of the sale of the property, can not complain that it was sold "in one lump," and that the interest of one of the minors, an undivided eighth, was not offered separately, unless he can show that, because of the mode in which the interest of the minor was sold, he did not acquire a good title to that interest.—*Estate of Hamilton*, 120 Cal. 421, 425, 52 Pac. 708. Purchasers at a guardian's sale, who close their eyes to facts, facts which

were open to investigation by the exercise of that diligence which the law imposes, are not protected. "Whatever is notice enough to excite the attention of a man of ordinary prudence and call for further inquiry is, in equity, notice of all facts to the knowledge of which an inquiry suggested by such notice and prosecuted with due and reasonable diligence would have led."—*Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 62 Pac. 862, 890; citing *Kerr on Fraud and Mistake*. A statute providing that a guardian's sale shall not be void by reason of any "irregularity in the proceedings" when the guardian made a sale, and the premises are held by "one who purchased them in good faith," does not protect one who purchased property at a guardian's sale, with notice of fraud in the proceedings, or of facts which would place him on inquiry, from an action to set aside the sale for fraud.—*Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 62 Pac. 862, 882, 883. An order of court, confirming a guardian's sale, which fails to direct the investment of the proceeds, goes to a matter subsequent to the consummation of the sale, and does not affect the purchaser's rights. He is not required to see that such proceeds are properly invested, and a failure to invest them at all could not defeat a sale properly made.—*Orman v. Bowles*, 18 Colo. 463, 33 Pac. 109, 113. Where a minor's interest in land, incapable of partition, is sold as a whole, at public auction, and it appears that the purchaser bid for the whole property, and knew what he was bidding for; that it was announced, at the time the property was offered, that bids would be received for the whole, and treated as pro rata bids for the several interests; that the court found that such pro rata bid for the interest of the minor was not disproportionate to its value; that an offer of ten per cent more, exclusive of the costs of the new sale, could not be had; and that the proceedings at the sale were fair,—such purchaser can not object to a confirmation of the sale of such minor's undivided interest.—*Estate of Hamilton*, 120 Cal. 421, 425, 52 Pac. 708. A purchaser at a guardian's sale may repudiate on the ground that the deed, inasmuch as the court was without jurisdiction in the proceeding, conveyed no legal title.—*Ansley v. Gault* (Okla.), 179 Pac. 16. The purchaser at a guardianship sale of real estate is charged with notice of the guardian's failure to give the bond required by law.—*Vanhorn v. Nestoss*, 99 Wash. 328, 337, 169 Pac. 807. The purchaser at a guardian's sale, all the proceedings relating thereto being regular upon their face, can not be ousted of his title by reason of the guardian's fraud in inducing such sale, where the purchaser did not participate in or have knowledge of such fraud.—*Scott v. Abraham* (Okla.), 159 Pac. 270. Where the land of a minor is sold by the guardian the purchaser and all other persons dealing with the land were charged with notice of the probate proceedings which showed that the minor's land was sold partly for cash and partly on time, and are also presumed to know, and are charged with notice of, the law as to guardianship sales.—*American Inv. Co. v. Brewer* (Okla.), 181 Pac. 294, 295. One who purchases from the ven-

dee of a guardian's sale must take notice, at his peril, of the authority of the guardian to make the sale, and if sufficient facts appear or are suggested by the record in connection with other circumstances which are brought to his notice, to put a reasonably prudent man on inquiry, and he neglects to make such inquiry, he will be held to have actual knowledge of the channel through which his grantor claimed title, and that her grantor in the guardian's deed, under which she held, was in fact her husband.—*Burton v. Compton*, 50 Okla. 365, 370, 150 Pac. 1080. A purchaser or incumbrancer from the vendee at a guardian's sale, with notice of such fraud as renders the sale void, is not an innocent purchaser, even though he pays a valuable consideration.—*Winsted v. Shank* (Okla.), 173 Pac. 1041. If the land of a minor is sold by his guardian, the purchaser and all others who afterwards deal with it are charged with notice of the probate proceedings through which the sale is made, also of the law involved, and must take notice that, in case there are deferred payments, the same must be secured by a first lien on the land sold.—*American Inv. Co. v. Brewer* (Okla.), 181 Pac. 294, 296.

#### 8. Setting aside.

(1) *In general.*—The judgment of a county court, when acting as a court of probate, in a proceeding by a guardian to sell the land of a ward, can not be questioned, except in the manner provided by statute.—*Gager v. Henry*, 5 Saw. 237, Fed. Cas. No. 5172. Proceedings for the sale of property by guardians are the same as those prescribed for the sale of property of decedents by executors or administrators. Hence if the court is satisfied from the evidence as to the value of the property, and that the amount bid for it by the purchaser, including an increased bid in the court, is disproportionate to the value of the property, it may, in its discretion, refuse confirmation of the sale, and set it aside, and order a new sale.—*In re Jack*, 115 Cal. 203, 206, 46 Pac. 1057. A guardian's deed is not prima facie evidence of the regularity of proceedings in the guardianship matter, and such a deed, accompanied by an alleged certified copy of an order of the probate court confirming the sale, must, in case of variance between such copy and the original record, yield to the latter.—*Jelinski v. Ruml*, 37 S. D. 253, 256, 157 N. W. 1051. On motion to set aside an order confirming a guardian's sale on the ground of the purchaser's having refused to pay the purchase price, the purchaser is apprised of the hearing so as to satisfy the statute if, on filing of such motion, the notice is served upon him by the sheriff of his county, who afterwards returns the same as served, and such notice recites the land, the place, the hour, and the nature of the proceeding.—*Brown v. Thompson* (Okla.), 175 Pac. 731. Where, in a proceeding to set aside a confirmation of a sale of the property of minor Indian allottees, an issue was presented as to whether or not it was to the best interest of the minors that the property be sold, it was error to refuse to hear evidence on this point, and to hear and pass upon such issue.—*In re Hickory's Guardianship*



(Okla.), 182 Pac. 233, 236, 237. In a proceeding by appeal from the county court to the district court to set aside a sale of property of minor Indian allottees on the ground that the value of the property was disproportionate to the price bid, it was proper to receive evidence of the value of the property on the day of the sale, and it was not error to sustain objections to the introduction of evidence as to its value on the date of confirmation, the bid received not having been raised on that date or a higher offer received (*Estate of Leonis*, 138 Cal. 194, 71 Pac. 171).—*In re Hickory's Guardianship* (Okla.), 182 Pac. 233, 235.

(2) *Fraud*.—A guardian's sale of land can be avoided by pleading and proving fraud in making the sale; or, the court may give such other relief as may be authorized by equitable principles; if fraud was perpetrated, the fact that it has the appearance of judicial sanction does not affect the right of the defrauded person to equitable relief.—*American Inv. Co. v. Brewer* (Okla.), 181 Pac. 294, 295. Where probate proceedings were had for the purpose of vesting title to an entire piece of property in the father of certain minors, so that he might mortgage it to get money for the purpose of finishing buildings in the course of construction on part of the property; where the children were to get a second mortgage, instead of having their interest sold for cash; where a form of bidding had been agreed upon, in advance, by the probate court, on testimony taken as to the fair value of the children's interest; and where the guardian was used as an instrument by the father to accomplish this end, with full knowledge of the probate court, —the sale will be set aside as fraudulent.—*Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 62 Pac. 862, 890. As to what evidence is sufficient to set aside a guardian's sale for fraud, where the allegations of the complaint attack certain probate proceedings and acts of the guardian, and the sale of the property made by him as fraudulent, see *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 62 Pac. 862, 891. Where certain shares of stock of a decedent's estate have been sold, and, by the terms of the will of the testator, a minor child is entitled to one-half of his estate, and a sale has been confirmed, the guardian of such minor child may be relieved from such order of confirmation, on the ground that the price received for the property was disproportionate to its value, and that the sale thereof, at such price, was a fraud upon the estate and upon such minor child. Such relief may be granted under section 473 of the Code of Civil Procedure of California, which provides that the court may, in its discretion, relieve a party, if application be made within a reasonable time, from a judgment taken against him, "through his mistake, inadvertence, surprise or excusable neglect." In applications for relief under this section, made within a reasonable time, no distinction is to be made between extrinsic or other fraud. Fraud, or its equivalent, whether upon the court, or upon a party, or one so situated as to be held in law an adversary, is sufficient to warrant relief.—*In re Johnson*, 7 Cal. App. 436, 94 Pac. 592, 594. If a ward has been induced by fraud and deceit to part with his prop-

erty for an inadequate consideration, he may either affirm the transaction and sue for damage, or repudiate the sale and invoke the aid of equity to have him and the purchaser placed in status quo; but he can not have both remedies.—*Marshall v. Gustin*, 89 Or. 53, 170 Pac. 312, 173 Pac. 461. Where the records of the county court, though regular on their face, show that a guardian's sale of his ward's real estate amounted to an indirect exchange of properties, such sale constitutes a constructive fraud upon the estate of the ward, and is voidable, and its value may be recovered by the ward in a suit against the persons acquiring the lands, with knowledge or notice of the fraud, when the same has been conveyed to innocent purchasers.—*Perkins v. Middleton* (Okla.), 166 Pac. 1104, 1107. Where a guardian sells the land of his ward upon a secret understanding that the purchaser shall not pay for the same, but will immediately convey the lands to the guardian's wife, and the sale is confirmed by the court and a deed executed and delivered to the purchaser, such facts constitute a fraud upon the estate of the ward and the sale may be set aside in an action against such purchaser and all persons who acquired rights in said lands with notice of such fraud.—*Winsted v. Shank* (Okla.), 173 Pac. 1041. Where a sale of his ward's land by a guardian was apparently made for cash, but, in fact, made by an exchange of other real estate, the exchange constitutes a fraud upon the estate of the ward, and may be set aside against the purchaser or any person acquiring rights in said lands, with knowledge, or who is chargeable with notice, of such fraud.—*Berry v. Tolleson* (Okla.), 172 Pac. 630, 631. The fraud which will justify the cancellation, in an equitable suit of the judgment or order of the probate court, must be extraneous to the issues, and such as prevented the complaining party from having a fair hearing.—*Driskill v. Quinn* (Okla.), 170 Pac. 495, 496.

(3) Other considerations in equity.—As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty. Upon this principle, no one placed in a situation of trust or confidence in reference to the subject of a sale can be the purchaser, on his own account, of the property sold. If such a one purchases the property, the option of the person interested in the property, and to whom the relation of trust or confidence was sustained, has the option to set aside the sale within a reasonable time, however innocent the purchaser may be.—*Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 62 Pac. 862, 891. The doctrine as to purchases by trustees, guardians, administrators, and persons having a confidential character arises from the relation between the parties, and not from the circumstance that they have power to control the sale. The right to set aside the sale does not depend on its fairness or unfairness. To set aside the purchase, it is not necessary to show that it was actually fraudulent or

advantageous. If the trustee, or other person having a confidential character, can buy in an honest case, he may in a case having that appearance, but which may be grossly otherwise; and yet the power of the court, because of the infirmity of human testimony, would not be equal to detect the deception. It is to guard against this uncertainty and the hazard of abuse, and to remove the trustee, and other persons having confidential relations, from temptation, that the rule does and will permit the cestui que trust or other person to come, at his option, and, without showing actual injury or fraud, have the sale set aside.—*Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 62 Pac. 862, 891. A district court of Oklahoma is justified, in the exercise of its equitable powers and upon sufficient evidence, in canceling the deed of a guardian to the land of a minor, and in annulling the order of the county court confirming the same.—*Elrod v. Adair*, 54 Okla. 207, 153 Pac. 660.

(4) *Guardian's sale to himself. Void sales.*—The sale of his minor ward's real estate by a guardian to his own wife is prohibited by statute and condemned by public policy, and such a sale, being so forbidden, is void, because it lacks both the sanction and the authority of the law.—*Burton v. Compton*, 50 Okla. 365, 367, 150 Pac. 1080. Where a guardian of a minor sells his ward's real estate to his own wife, the deed is void, regardless of the absence of fraud, the adequacy of price, or the apparent regularity of the proceedings.—*Burton v. Compton*, 50 Okla. 365, 367, 150 Pac. 1080. A sale by a guardian of real estate belonging to his ward to himself through the interposition of a third person is not void absolutely, but is voidable in an action brought to set aside the same against the purchaser or guardian or some one claiming under him with knowledge of the circumstances of the sale, or one who was not a bona fide purchaser or incumbrancer for good and sufficient consideration and without notice.—*Allison v. Chummev* (Okla.), 166 Pac. 691, 693; *Langley v. Ford* (Okla.), 171 Pac. 471, 473. An action brought for the purpose of declaring a guardianship sale of real estate illegal and void for want of jurisdiction in the court to order the same, the guardian having failed to give the bond required by law, is a proper attack upon the sale, and where the record shows conclusively that no bond was given, the sale was void, and it is immaterial whether the action was a direct or a collateral attack.—*Vanhorn v. Nestoss*, 99 Wash. 328, 337, 169 Pac. 807.

(5) *Return of consideration.*—In an action by a minor Creek freedman allottee to set aside a void deed to his allotted lands, it is not necessary to plead a formal tender or offer to return the consideration thereof, as a condition precedent to maintaining an action for the cancellation of such void conveyance.—*McKeever v. Carter*, 53 Okla. 360, 157 Pac. 56. If a minor citizen of the Choctaw Nation of Indians sues to set aside a void guardianship sale of his lands, and alleges that he has no part of the consideration of the sale and never received any part thereof, such minor is not required to pay or to tender back such con-

sideration as a prerequisite to the maintenance of his suit.—*Winters v. Oklahoma P. C. Co. Okla.*, 164 Pac. 965.

#### 9. Collateral attack.

(1) *In general.*—If the question as to a guardian's sale of lands of his ward arises collaterally, and the pleadings do not attack the proceeding for want of jurisdiction, and the record discloses jurisdiction, both of the parties and of the subject-matter, the sale will be sustained.—*McCulloch v. Estes*, 20 Or. 349, 25 Pac. 724.

(2) *Definitions.*—A "collateral attack" on a judicial proceeding is an attempt to avoid, defeat, or evade or deny its force and effect in some incidental proceedings not provided by law for the express purpose of attacking it, and it is held that an action to set aside a conveyance by a guardian of the lands of his ward, made after a petition and order of sale, brought against the purchaser and grantee of the same under said guardian's sale, is a collateral attack upon the proceeding resulting in such sale.—*Sockey v. Winstock*, 43 Okla. 758, 763, 144 Pac. 372. The attack is "direct," and not "collateral," when the validity of the record attacked is directly put in issue by the pleadings of the parties attacking it, by proper averments; and the converse is true, that, when there are no proper averments attacking the record, the attack is then "collateral," and not "direct."—*Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537, 553. If certain probate proceedings, and the acts of the guardian for minors, and a sale of their property made by him, are attacked as fraudulent, in a complaint which seeks the foreclosure of mortgages on the property, but such complaint, in apt and specific allegations, directly attacks the probate proceedings, and the guardian's deeds thereunder, and issues are joined on these allegations, the plaintiff, by presenting his complaint so drawn with a double aspect, can not be said to have waived the fraud in the guardian's sales, and the attack thereon is not collateral. Such a complaint, where it contains a prayer for relief generally, as well as one for the foreclosure of the mortgages, will justify a decree restoring mortgages wrongfully canceled, and their foreclosure, or a decree adjudging the guardian's sales and deeds void, and giving to the children an unencumbered interest in the property.—*Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 62 Pac. 862, 881. Where a petition in a suit to quiet title to certain land alleges that an order of court directing a guardian to sell the land was procured by fraud and prays to have the order of sale and subsequent orders approving the sale canceled, the suit is a direct attack and not a collateral attack.—*Brown v. Trent*, 36 Okla. 239, 128 Pac. 895. If the female plaintiff in ejectment, to prove title in herself, assails the validity of the record of the county court appointing for her a guardian, who as such pursuant to an order of the court, had subsequently sold and conveyed the land in controversy to one of the defendants, such attack is collateral, and the record, being one of a court of general jurisdiction

as to probate matters, can not be impeached by any evidence or allegation that the guardian appointed by the court was himself, at the time of such appointment, a minor.—*Johnson v. Johnson* (Okla.), 159 Pac. 1121.

(3) When not effective.—The question as to whether an appraisal gave sufficient information to the court to enable it to exercise its judgment in confirming a sale is a matter which can not be attacked collaterally, if the court had jurisdiction to determine the sufficiency of the evidence upon the matter in hand.—*Smith v. Biscailuz*, 83 Cal. 344, 359, 21 Pac. 15, 23 Pac. 314. A guardian's deed will not be held void upon a collateral attack, merely because the petition of the guardian for leave to sell his ward's real estate does not affirmatively show the circumstances of a condition which, under the statute, authorizes such sale.—*Beachy v. Shomber*, 73 Kan. 62, 84 Pac. 547. The judgment of a probate court, regular upon its face, appointing a guardian for a minor, can not be attacked collaterally upon the ground of fraud, collusion, or other matter aliunde.—*Hodgdon v. Southern Pac. R. R. Co.*, 75 Cal. 642, 17 Pac. 928, 931. So a judgment permitting a guardian to sell the real estate of his wards can not be collaterally attacked on the ground that the required statutory notice by publication was not given, as this is not a jurisdictional defect. One has a right to attack a judgment in a collateral proceeding for a jurisdictional infirmity,—that is, error in assuming jurisdiction; but, on the other hand, a judgment can not be questioned collaterally for an error committed in the exercise of its jurisdiction.—*Mortgage Trust Co. v. Redd*, 38 Colo. 458, 120 Am. St. Rep. 132, 8 L. R. A. (N. S.) 1215, 88 Pac. 473, 475. Where the court has jurisdiction to enter an order and judgment appointing a special guardian, and for the sale of the lands of certain minor heirs, and no appeal is taken from the same, such order and judgment can not be attacked collaterally in a civil action in the nature of ejectment.—*Hagerman v. Meeks*, 13 N. M. 565, 86 Pac. 801. If the record contains a recital of the facts requisite to confer jurisdiction, it is conclusive when attacked collaterally.—*Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537, 553. Irregularities in such proceedings, occurring after the court has acquired jurisdiction, do not affect the validity of the sale upon collateral attack.—*Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324, 327. Neither irregularities alone, nor mere omissions from the record, are sufficient to destroy the validity of judicial proceedings, where such errors could have been corrected on appeal or other direct proceedings. Collateral attacks of this kind are never favored; and it devolves on those making the attack to show clearly and conclusively that the court had no jurisdiction, before the proceeding will be held void.—*Bradford v. Larkin*, 57 Kan. 90, 45 Pac. 69, 70. Where a petition, by a guardian, to sell certain land belonging to his ward states, among other things, that the ward had no money or personal property, and that it was to his interest, and necessary for his support and educa-

tion, that the land should be sold, and describes the land without stating specifically in what county or state it is situated, or in what range or township, but land answering to such description was in fact situated in a certain county, where all the parties interested resided, and where all the proceedings were had, it was held that the petition would be sufficient, where the sale under it was attacked collaterally, many years afterwards.—*Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116. Where the validity of the appointment of a guardian, and a sale of his ward's land, are attacked collaterally, the rules of law hedging about the validity of such sales are to be invoked against the plaintiff. The order of sale is presumed to have been a valid one, and it behooves the plaintiff to show the contrary. The burden is upon him to show a void sale. The absence of evidence in the record showing the jurisdictional facts may be taken as evidence against him. If the posting of notices was not performed according to the requirements of the statute, it is for him to show that fact. If the evidence does not show how it was done and when it was done, it will be presumed that it was done in the proper manner and at the proper time.—*Asher v. Yorba*, 125 Cal. 513, 58 Pac. 137, 138. Whatever may be the law in other states, it is settled, under the statute of Kansas, that the order of a court confirming a guardian's sale becomes res judicata as to irregularities only, and cures nothing of substance; certainly not unless the matter of substance is exhibited on the face of the sale proceeding.—*Frazier v. Jeakins*, 64 Kan. 615, 57 L. R. A. 575, 68 Pac. 24, 27. If suit is brought for damages for the appropriation of land for right of way purposes, and the defense is made that a predecessor of the defendant had purchased the land at a guardian's sale, a judgment setting aside such sale for want of payment of the bid, and setting aside confirmation thereof, can not be collaterally attacked in this action; if the proceedings as to vacating that sale were erroneous, a direct proceeding should have been brought to correct the irregularity.—*Muskogee E. T. Co. v. Maddin*, 55 Okla. 322, 155 Pac. 540.

(4) **Void proceedings are subject to.**—A guardian's sale, if a nullity under the law, is subject to collateral attack, although the probate court has confirmed the sale, as where an action of ejectment was brought to recover a title claimed under a trustee's sale to himself, or, in effect, to himself. In order to characterize a guardian's sale and deed as "void," in the sense in which that word is most frequently used in the law, it is not necessary to regard them nonexistent. They have a form of existence, and, under certain circumstances, they may be allowed, or may acquire the substance of existence. A plaintiff may ratify them by express act or deed. He might estop himself by some course of conduct to question the validity, or he might allow lapse of time to bar his right to recover on the score of their invalidity. But until by ratification, estoppel, or limitation he has given effect to them, he is believed to treat them as void and of no effect. As to

him, they are void and of no effect, because they failed to pass the title to his land. In order to characterize an act or transaction as void, it is not necessary that it should be a nullity as to everybody, and for all time, and under all circumstances. If the act or transaction fails to deprive interested persons of their rights or titles, fails to confer them on some one else, the act or transaction is void as to such persons. If the act or transaction requires ratification, estoppel, or limitation to transfer the right or title, it is void until the ratification has been made, the estoppel has occurred, or the time has elapsed; and even then the right or title does not pass by virtue of the original act or transaction, but passes by virtue of the ratification, or is founded on the estoppel, or is set at rest by the lapse of time.—*Frazier v. Jeakins*, 64 Kan. 615, 57 L. R. A. 575, 68 Pac. 24, 28. When the petition of the guardian to sell his ward's real estate contains the facts substantially in accordance with the requirements of the statute, the court of probate jurisdiction acquires jurisdiction thereof, and the proceedings, although irregular and erroneous, are not void or subject to collateral attack.—*Sockey v. Winstock*, 43 Okla. 758, 761, 144 Pac. 372. A guardian's deed will not be held void on a collateral attack merely because the guardian's petition to sell the real estate of his ward defectively states the existence of the conditions under which the statute authorizes the sale.—*Cowan v. Hubbard*, 50 Okla. 671, L. R. A. 1918C, 958, 151 Pac. 678. Where a guardian's deed is void, and the sale under which it was executed a nullity, and the right of no innocent party has intervened, the deed and the sale under which it was executed may be attacked collaterally.—*Burton v. Compton*, 50 Okla. 365, 371, 150 Pac. 1080.

#### REFERENCES.

Right of guardian to acquire ward's property. See note 21 Ann. Cas. 1119. Power of guardian as to contract of sale. See note ante, subd. 4 (4).

#### 10. Lease and demise of ward's property.

(1) *In general.*—If a guardian is appointed for the estate of a minor, and such guardian's bond is presented and approved, a lease afterwards made by him of the ward's property is valid, though no letters of guardianship have been issued to the guardian, and no oath of office has been taken by him.—*Whyler v. Van Tiger*, 2 Cal. Unrep. 800, 14 Pac. 846. Where a guardian makes a lease of the premises of his ward, without complying with all the requirements of the law, and the party to whom the lease is made, without warranty, conveys the same to a third party, who enters upon the premises and enjoys the peaceable and uninterrupted possession thereof, and reaps the fruits of the lease, he can not be heard to question the validity of the lease, or of the assignment, in defense of a note given in consideration of such assignment. It would be a gross inequity and injustice to allow the assignees to take the benefits of the lease, and then avoid

payment of the note given in consideration of the same.—*Norton v. Stroud State Bank*, 17 Okla. 295, 87 Pac. 848, 849, 851. If a lease has been made by an infant lessor, the guardian of such infant lessor, after the expiration of the lease, has no power, unless expressly authorized by the court, to consent to a lien upon the leased premises for improvements made thereon by the lessee.—*Hughes v. Karshow*, 42 Colo. 210, 15 L. R. A. (N. S.) 723, 93 Pac. 1116, 1118. The control by a guardian of his ward, as set out in the statutes of the state, does not authorize the guardian of an Indian minor to make a grazing lease of his ward's surplus allotment, for a term of three years, without the express approval or authorization of the county court so to do.—*Balley v. King*, 57 Okla. 528, 157 Pac. 763, to the contrary, overruled.—*Bryant v. Montgomery (Okla.)*, 174 Pac. 1080. The United States court for the southern district of the Indian Territory had authority to appoint a guardian or curator of the estate of a minor located in that district although the domicile of the minor was in the central district and a guardian so appointed, when qualified, had authority to execute a valid lease of the minor's land.—*Ma Harry v. Eatman*, 29 Okla. 46, 116 Pac. 935. One of two joint guardians has no authority to make a lease of the ward's property without the consent of the other.—*Sargent v. Shaver (Okla.)*, 172 Pac. 445.

(2) *Lease of Indian allotments.*—The lease of a restricted homestead for oil, gas, or other mining purposes, under section 2 of the act of congress of May 27, 1908, is an alienation of that part of the land constituting the homestead which the lease permits the lessee to take from it by the discovery and removal thereunder of the oil, gas, or other mineral therein.—*Parker v. Riley (Okla.)*, 243 Fed. 42, 47, 155 C. C. A. 572. Where restrictions upon the leasing of a ward's surplus allotment have been removed, but those retained against the alienation of the homestead, a lease is void as to the homestead portion of the allotment, but valid as to the surplus portion thereof.—*Boxley v. Scott (Okla.)*, 162 Pac. 688. An Indian, who made a lease of land, will be presumed to have been an adult at the time he made the lease; and one who relies upon his infancy to defeat his act has the burden of proof; the question whether the lessor was competent to enter into such a contract, is defensive matter not available to the defendant under a general denial.—*Mullen v. Carter (Okla.)*, 173 Pac. 512. An oil and gas lease of lands having been made jointly, and in accordance with law, by the surviving husband and the two minor children (by their guardian) of a full-blood Creek Indian, as her heirs at law, said lands having been her homestead allotment, duly selected, allotted, and patented to her, the proceeds are to be enjoyed by the three owners of the fee, share and share alike.—*Parker v. Riley (Okla.)*, 243 Fed. 42, 48, 155 C. C. A. 572.

(3) *Same. Controlling statutes.*—The provisions of the act of congress of May 27, 1908, relative to the rights and interests of the lessors of a  
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gas and oil lease of restricted lands, in so far as they are in any respect repugnant to and inconsistent with those of the original or of the supplemental Creek agreement relative to the same subject, repealed to the extent of that repugnancy and became substitutes for those earlier provisions; they do not deprive any of the parties in interest of any of their vested estates or constitutional rights; but the rights and interests of such lessors are governed and measured by the provisions of that act.—*Parker v. Riley* (Okla.), 243 Fed. 42, 51, 155 C. C. A. 572. That portion of the act of congress of March 1, 1907, which relates to the constructive notice given to subsequent purchasers and others by the filing of a lease by an allottee of an allotment of Indian land made by the United States, was neither repealed, annulled, nor modified by the subsequent admission of Oklahoma into the Union, by the recordation statutes of the territory or state found in Revised Laws of Oklahoma of 1910, sections 1154 and 1155, by the enabling act, the constitution, or the schedule of the constitution of that state.—*Anchor Oil Co. v. Gray* (Okla.), 257 Fed. 277, 280.

(4) Same. Approval of Secretary of Interior.—Guardians' leases of allotments of Indian minors in the Five Civilized Tribes confirmed and approved by the trial court in that jurisdiction since April 26, 1906, are not subject to the approval or disapproval of the Secretary of the Interior, but the orders of the court confirming them are final.—*Cowles v. Lee*, 35 Okla. 159, 128 Pac. 668. In the act of May 27, 1908, relative to homestead allotments to members of the civilized tribes in Oklahoma, section 1 authorizes the Secretary of the Interior to remove wholly or partly from the land the restrictions upon alienation; this would include authority to remove restrictions on leaseholds and their products.—*Parker v. Riley* (Okla.), 243 Fed. 42, 45, 155 C. C. A. 572. The approval of the Secretary of the Interior of a gas and oil lease of lands is a removal of restrictions upon alienation, from the oil and gas and from that part of the land which the lessee takes from the lessors in order to obtain such oil and gas.—*Parker v. Riley* (Okla.), 243 Fed. 42, 47, 155 C. C. A. 572. The act of congress of May 27, 1908, provides that, if any member of the Five Civilized Tribes shall die leaving issue born since March 4, 1906, the homestead of the allottee shall remain inalienable for the use and support of such issue during their lives until April 26, 1931, unless such restrictions against alienation are removed by the Secretary of the Interior; and authorizes leases of restricted lands for oil, gas, or other mining purposes, with the approval of the Secretary of the Interior; under these provisions it was held that, where an allottee died leaving a child born after March 4, 1906, and other heirs, the subsequent approval by the Secretary of the Interior of an oil and gas lease by the heirs, removed the restrictions on alienation from the leasehold and the royalties thereunder.—*Parker v. Riley* (Okla.), 243 Fed. 42, 45, 155 C. C. A. 572. A Creek minor of full blood, through his guardian, and with the approval of the Secretary of the Interior, executed, in 1912, an oil and gas lease

on his allotment, which was subject to restrictions upon alienation; the lessor died while yet a minor, but a large sum in royalties had been previously collected; and it was held that, under the act of congress of May 27, 1908, the effect of the death of the lessor was to terminate all control, by the Secretary of the Interior, over the land as well as over the royalties previously collected.—*Richard v. Parker* (Okla.), 245 Fed. 330, 334, 157 C. C. A. 522. Inasmuch as a law, controlling in Oklahoma, requires that leases made by a guardian, of his ward's allotted lands must, to be valid, be approved by the probate court, approval by the Secretary of the Interior does not dispense with the court's approval in the case of such a lease of oil and gas rights in the lands.—*Robinson v. Long Gas Co.* (Okla.), 221 Fed. 398, 401.

(5) Same. Approval and order of court.—A lease executed by a natural guardian who has not submitted himself or his actions to a court having jurisdiction, nor executed a bond, nor procured an order to lease, is void as to such infant, at his or the option of those who legally represent him.—*Capps v. Hensley*, 23 Okla. 311, 100 Pac. 575. An order of court permitting a guardian to lease his ward's land is indispensable to a valid lease; a mere memorandum on the lease does not constitute "an order of court."—*Fisher v. McKeemie*, 43 Okla. 577, Ann. Cas. 1917C, 1039, 143 Pac. 850. The county courts of Oklahoma have power to order a minor's guardian to execute oil and gas leases of the ward's lands for terms extending beyond the ward's minority.—*Mallen v. Ruth Oil Co.* (Okla.), 230 Fed. 497, 501, 502. Where restrictions on alienation have been removed by congress, the leases of Indian minors, coming within the purview of such removal, do not have to be approved by the court having jurisdiction of the guardianship of such minors, nor do such leases have to be recorded to make them valid and binding.—*Bailey v. King*, 57 Okla. 528, 157 Pac. 763. A guardian who has executed an oil and gas mining lease under the order of and with the approval of the county court has no power thereafter to modify the terms of the lease by his act alone without the approval of the county court, nor will the guardian's statement to the effect that the lease is modified bind the minor.—*Ardizzone v. Archer* (Okla.), 160 Pac. 446. A guardian has power to make an agricultural lease of his ward's land for any term not extending beyond the minority, provided the lease is made under the direction, and with the approval of the county court having jurisdiction of the minor's estate.—*Coleman v. Davis* (Okla.), 180 Pac. 381, 383. The legally qualified and acting guardian of a minor allottee of the Chickasaw Tribe of Indians, of less than one-half Indian blood is authorized, by the Oklahoma statute, under the direction and with the approval of the county court having jurisdiction of such minor's estate, to give an agricultural lease on the allotted lands of such minor for a fixed term during the minority of such minor, although the lease does not expire until more than five years from the date thereof.—*Coleman v. Davis* (Okla.), 180 Pac. 381. It is not required

of a guardian in Alaska, before making a lease for the ward, of premises owned by the latter, that he first obtain an order from the court.—*White v. White Co.*, 4 Alaska 317, 321.

(6) *Validity of lease extending beyond ward's minority.*—While at common law all leases by a guardian to extend beyond the term of the guardianship were voidable, a lease of a minor's land pursuant to an order of the probate court was valid, though it extended beyond minority.—*Cowles v. Lee*, 35 Okla. 159, 128 Pac. 688; *Hustin v. Cobleigh*, 29 Okla. 793, 119 Pac. 416. The language and necessary intentment of the provisions of the constitution and statutes of Oklahoma, taken singly or altogether, make it clear that a guardian's lease, made with the approval of the county court, demising oil and gas land of his ward's for a term extending beyond his minority, and even "so long thereafter as oil or gas is found on said premises in paying quantities," is valid.—*Mallen v. Ruth Oil Co. (Okla.)*, 231 Fed. 845, 851. The guardian of an Indian minor may, with the approval of the probate court having jurisdiction, lease the ward's oil or gas lands for a term extending beyond the period of minority.—*Etchen v. Cheney (Okla.)*, 235 Fed. 104, 106. While it is true that a guardian can not, in Hawaii, lease the land of his ward for a period beyond the latter's minority, so as to bind the ward, yet the lease is binding on the lessee after that time, unless the ward terminates it, and it may be ratified or disaffirmed by the ward, at his option.—*Nawahi v. Hakalau Plantation Co.*, 14 Haw. 460, 462.

(7) *Collateral attack.*—A lease of oil and gas mining privileges made by the guardian of a minor, permission of the court having first been obtained and such lease having been approved and confirmed by the court, though without the preliminary notices essential for the order of sale and confirmation of the same in case of the sale of real estate of minors by guardians, is valid against a collateral attack.—*Duff v. Keaton*, 33 Okla. 92, 42 L. R. A. (N. S.) 472, 124 Pac. 291. If a guardian's oil and gas lease extends beyond the period of the ward's minority, but is, notwithstanding that fact, approved by the county court, on the ground that such lease is for the best interests of the ward, it can not be collaterally attacked.—*Mallen v. Ruth Oil Co. (Okla.)*, 230 Fed. 497.

#### REFERENCES.

Mortgages and leases of real estate by guardians. See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1577-1579.

#### 11. Mortgage of ward's property.

(1) *Petition as foundation of jurisdiction.*—To obtain an order of the court authorizing the guardian to mortgage the real estate of his ward, the foundation of jurisdiction is the petition filed by the guardian for leave to mortgage, and the petition for such order is not sufficient, unless it appears that all of the requirements of the

statute have been complied with in procuring the order empowering the guardian to execute the mortgage.—Howard v. Bryan, 133 Cal. 257, 260, 65 Pac. 462; Howard v. Bryan, 6 Cal. Unrep. 547, 62 Pac. 459.

(2) *Authority to mortgage.*—A county court in Oregon can not authorize a guardian to mortgage the real estate of his ward.—Trutch v. Bunnell, 11 Or. 58, 50 Am. Rep. 456, 4 Pac. 588. A guardian has no power to make a contract binding upon the ward or upon his estate, however proper and beneficial the contract may be. Contracts made by him impose a personal liability upon himself, and his protection from loss lies in his right to charge the expenditure to the ward's estate in his account. If the guardian is authorized to mortgage the real estate of his ward only for the purpose of providing suitable maintenance of the ward and his family, that is the only instance in which he may mortgage such real estate, and even in such case it is necessary for him to obtain an order of court therefor.—Andrus v. Blazzard, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888, 890. Though there is no direct authority in the statute to mortgage the ward's real estate, still, where the statute declares that the guardian must safely keep the property of his ward; that he must maintain the same with its buildings and appurtenances; and that he shall deliver it to the ward at the close of his guardianship in as good condition as he received it, a district court, in Montana, may allow the guardian to mortgage such estate for an amount sufficient to pay off a mortgage thereon, which is overdue, and on which foreclosure proceedings are threatened. The interest of the infant in such case manifestly requires that the lien or encumbrance upon the estate should be discharged; and the general doctrine refusing a guardian the privilege of mortgaging his ward's estate is not applicable in such a case, where the opportunity seemed to present itself to save the infant's estate, not by creating a debt, or by borrowing money, but by simply transferring an already existing debt from one creditor to another.—Northwestern Guaranty L. Co. v. Smith, 15 Mont. 101, 46 Am. St. Rep. 662, 38 Pac. 224, 226. The law can not be construed to authorize the mortgage of a minor's estate to pay any debt but his own. It must be such a mortgage as he can discharge by paying what he is individually bound for, and such as will admit of a redemption of the payment of that which is due from him on his own account. Hence a court has no jurisdiction to authorize a joint mortgage of the property of several minor wards to pay an aggregate sum, which includes a large private indebtedness of the guardian, for which the estate is not liable, and which encumbers the property of each minor with aggregate charges made against the property of all the other minors. Such a joint mortgage would be void.—Howard v. Bryan, 133 Cal. 257, 260, 261, 267, 65 Pac. 462. Under a statute which confers power upon a guardian to sell his ward's estate for the purpose of raising funds to pay debts or to maintain the ward, the guardian can not be authorized, by order of court, to

mortgage his ward's land to secure a debt contracted for the improvement of the estate.—*Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82, 84. In the territory of Hawaii, a guardian does not now have the power he formerly possessed of mortgaging the real estate of his ward, without authority from any court.—*Hoare v. Allen*, 13 Haw. 257, 262. In Kansas the probate court has jurisdiction to authorize a guardian to execute a mortgage upon real estate owned by several wards giving a lien upon all the property for the whole debt secured.—*First Nat. Bank of Winfield v. Bangs*, 91 Kan. 54, 136 Pac. 916. Under a decree of divorce community property consisting of a house and lot was set aside for the use, support, maintenance, and education of the minor children. The mother was awarded the custody of the children and afterward was appointed their guardian. There was a mortgage on the property. The court granted the guardian permission to borrow more money on the property to pay off the original mortgage and provide further funds for the maintenance and education of the children. Held that this was proper and within the purposes of the trust created by the decree of divorce.—*Schmitt v. Jenson*, 37 Nev. 150, 140 Pac. 519. If a guardian, who has no statutory power to mortgage the ward's property, makes such a mortgage to an uninterested person, when no innocent person can be injured, the purpose of the transaction being to obtain funds to pay to an existing mortgagee of the property, who threatens foreclosure, such uninterested person will be subrogated to such mortgage.—*Laffranchini v. Clark*, 39 Nev. 48, 153 Pac. 250. Under the act of congress of May 27, 1908, which took effect July 27 following, a three-fourths blood Creek Indian, under the age of 21 years can not make a valid mortgage of lands allotted to him by reason of tribal relations.—*Gum Bros. Co. v. Morton* (Okla.), 175 Pac. 350, 352.

(3) *Validity of order and mortgage.*—If a fair and reasonable construction of an order authorizing the guardian to mortgage the estate of his ward may be made, which will make it valid, the court is bound to make that construction.—*Howard v. Bryan*, 6 Cal. Unrep. 547, 62 Pac. 459. Non-compliance with a statute which authorizes and directs a guardian to give the mortgagee a promissory note for the amount of money loaned, though it may be a substantial departure from the statute, is not to be deemed a jurisdictional departure; and where the attack upon the mortgage is collateral, no mere error or irregularity in the proceeding, however important or substantial, will invalidate the mortgage, particularly where the statute declares that no mere error or irregularity in mortgaging the property of minor heirs under order of court shall invalidate the mortgage.—*Howard v. Bryan*, 6 Cal. Unrep. 547, 62 Pac. 459, 460. In Montana it is held that a law which authorizes the court to disregard certain irregularities in sales by guardians does not apply to proceedings which were wholly void under the law at the time at which they took place. Thus such a statute does not apply to a mortgage by a guardian, given to secure

debts contracted for the improvement of the estate; because a guardian has no power to encumber the estate of his ward, or to bind the ward personally on any undertaking entered into on the ward's behalf.—*Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82. A mortgage given by a guardian is not made void by the fact that he failed to give a bond. It is the established law of this state, that a purchaser or mortgagee need not inquire whether a bond has been given prior to a guardian's sale of real estate.—*Hunt v. Insley*, 56 Kan. 213, 42 Pac. 709, 710. Under section 6364, Rev. Laws of Oklahoma, 1910, the power of the county court to authorize a guardian to mortgage the lands of his wards is limited to debts for which such estate or any part thereof is then legally liable to be ordered sold.—*Yawitz v. Hopkins (Okla.)*, 174 Pac. 257, 259. Before the county judge has any authority to make an order authorizing a guardian or administrator to mortgage or encumber any part of the real estate in his hands in his fiduciary capacity, notice must be given and a hearing had on its return.—*Yawitz v. Hopkins (Okla.)*, 174 Pac. 257. If the order, authorizing a guardian to mortgage the ward's real estate, erroneously describes the property, the court may afterwards, by a nunc pro tunc order, correct the error.—*Roth v. Union Nat. Bank*, 58 Okla. 604, 160 Pac. 505.

(4) *Revival and foreclosure of former mortgage.*—One who, through mistake of law, lends money with which a mortgage, executed by and existing upon the real property of a person since deceased, is satisfied, and takes therefor the promissory note of the guardian of the minor heirs of such deceased person, such guardian being also the owner of an undivided one-third interest in the premises, and by whom a mortgage upon said real property is executed to secure said promissory note, is not entitled to a decree in equity reviving and foreclosing the former mortgage, unless it appears from the complaint and evidence that said guardian and maker of the last-mentioned obligation is insolvent, or that his mortgaged interest in the land will be insufficient to secure the payment of the note when the same matures.—*Kelsey v. Welch*, 8 S. D. 255, 66 N. W. 390.

(5) *Collateral attack.*—An order of the county court, authorizing the guardian of a Cherokee Indian minor of one-eighth Indian blood, to mortgage the ward's allotted lands, to pay an existing claim or demand for which such lands, at the time, were not legally liable, is void, and subject to collateral attack without allegation or proof of fraud in its procurement; the mortgage is also void and subject to such collateral attack.—*Roth v. Union Nat. Bank*, 58 Okla. 604, 160 Pac. 505. An order authorizing a guardian to mortgage his ward's estate to pay an existing indebtedness for which such estate is answerable, though made on the same day that application therefor was filed, and without notice, is irregular but not void, and can not be collaterally attacked

without alleging and proving fraud in its procurement.—*Roth v. Union Nat. Bank*, 58 Okla. 604, 160 Pac. 505.

#### REFERENCES.

Mortgages and leases of real estate by guardians.—See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1577-1579.

12. *Non-resident guardians and wards.*—Except as a matter of comity, and in exceptional cases, the guardian of a minor appointed in one state is not recognized as such in another state. And a statute providing that letters of administration shall issue to the guardian of a minor, instead of to the minor himself, refers to a guardian appointed in this state, and not to one appointed in some other state.—*In re Nickals*, 21 Nev. 462, 34 Pac. 250. Jurisdiction to appoint a guardian for minor children is in the probate court of their domicile, even though they may not be within the jurisdiction of the state at the time; and the probate court of another state, where the children may be merely sojourning, has no such jurisdiction.—*Modern Woodmen v. Hester*, 66 Kan. 129, 71 Pac. 279. A beneficiary certificate issued by a fraternal beneficiary society, suable in another state, in favor of minor children domiciled in that state, has its legal situs at their domicile, and is an asset in the hands of the guardian appointed there, and the presence of the paper in another state does not authorize the appointment of a guardian for the minors in such other state.—*Modern Woodmen v. Hester*, 66 Kan. 129, 71 Pac. 279. Where foreign guardians of non-resident wards are authorized by local statutes to receive and remove from the state personal property of their wards in the hands of local guardians and others, they have been authorized to maintain suits within the state, to recover for debts due their wards. Even in the absence of such statutes, it seems to be competent for a court possessing chancery powers to order funds belonging to the ward, in the hands of a resident guardian, to be transmitted and paid over to the domiciliary guardian. It is discretionary, however, with the local courts, even under such statutes, to refuse permission to the foreign guardian to remove the property from the state if it is for the best interests of the ward that the property should be administered within the state. When the non-resident guardian of a non-resident ward applies for permission to remove the property of his ward from the state, he must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, showing his appointment as guardian of the ward in the state or territory in which he and his ward reside; that he has qualified as such according to the laws thereof, and given bond with sureties for the performance of his trust; and must also give notice for the required time to the resident executor, administrator, guardian, agent, or trustee, if there be such, of his application. Thereupon, if no objection be made, or if no good cause be shown to the contrary, the judge of the court shall make an order granting such guardian leave to remove the property of said ward to

the state or territory in which he or she may reside; which order shall be full and complete authority to said guardian to sue for and receive the same in his own name, for the use and benefit of said ward.—*In re Crosby*, 42 Wash. 366, 85 Pac. 1, 2. The guardian of a minor appointed by a probate court of another state is not authorized, as such, to sell lands of his ward situated in this state.—*McNeil v. First Congregational Society, etc.*, 66 Cal. 105, 4 Pac. 1096. A non-resident guardian, by consenting to a probate sale of the land of his ward in this state, can not give the court any jurisdiction to make an order for such sale.—*Wilson v. Hastings*, 66 Cal. 243, 247, 5 Pac. 217. On the application of a party to be appointed guardian of a minor, who resides out of the state, the notice to be given to all persons interested is a matter for the exclusive judgment of the probate judge; and third persons can not question the validity of an order upon any allegation that insufficient notice was given to the heir of the application for the appointment.—*Gronfier v. Puymiroi*, 19 Cal. 629, 631. A foreign guardian has no authority to bind the real estate of his ward situated in this state, and his consent that such estate be sold does not confer jurisdiction upon the court to make an order of sale therefor.—*Wilson v. Hastings*, 66 Cal. 243, 247, 5 Pac. 217. Third persons can not question the validity of an order appointing a guardian for a non-resident minor on the ground that insufficient notice was given of the hearing of the application for the appointment.—*Gronfier v. Puymiroi*, 19 Cal. 629, 632. In the absence of evidence it will be presumed that the statutory provisions of a foreign state regulating the rights of guardian and ward are the same as those of the former.—*Nichols v. Bryden*, 86 Kan. 941, 122 Pac. 1119.

#### REFERENCES.

Non-resident guardian and ward.—See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1793-1799, and notes.

#### 13. Accounting and settlement.

(1) *In general.*—In a petition for the settlement and allowance of a guardian's account, it is not necessary to allege the steps taken in procuring his appointment, since probate courts are, in such matters, courts of general jurisdiction, and every intendment is in favor of the regularity of their judgments and orders.—*In re Brady*, 10 Ida. 366, 79 Pac. 75. When the final account of a guardian is to be settled, notice for the statutory period must be given of the time and place of the hearing thereof; and in a case where the ward has deceased, the proceeding for the settlement of the account must be had with the legal representatives. His interests are adverse to those of the guardian, and he is a necessary party to the proceeding, although he may be brought in by constructive notice only. There is a proceeding of a special nature in which the only process required by law is the posting of a general notice for a statutory period. In all cases where, by statute, a substituted service of notice is authorized in place of actual



service, a strict compliance with the statute is essential to a valid service. A publication of posting for less than the required time is ineffectual to give jurisdiction, and renders the subsequent proceeding under such notice void.—*Livermore v. Ratti*, 150 Cal. 458, 89 Pac. 327, 328, 330. When findings are filed on a contest of the settlement of a guardian's account, they may be considered for the purpose of determining the issues upon which such findings were made; but it is not necessary to have findings in such a case.—*Estate of Schandoney*, 133 Cal. 387, 394, 65 Pac. 877; *Estate of Levinson*, 108 Cal. 450, 455, 41 Pac. 483, 42 Pac. 479. As the law respects form less than substance, it is the duty of the court to disregard any error or defect in a guardian's account which does not affect the substantial rights of the parties. Hence where it appears that the account of the guardian was his "final" account, it may be settled, although it was miscalled an "annual" account.—*In re Dow*, 133 Cal. 449, 65 Pac. 890, 892. The statute making it the duty of the guardian to file his account upon the expiration of one year from the time of his appointment does not prohibit him from filing and presenting it sooner.—*Estate of Hayden*, 146 Cal. 73, 79 Pac. 588. In a guardian's account, charges for medical attention are sufficiently itemized, within the meaning of the statute, where they show the date of payment, the amount, the person to whom paid, and the nature of the services. It is not necessary that the bill of a physician or of a lawyer should contain each item that goes to make up the charge. If the amount of the claim is disputed, or if it is denied that the services were rendered, the court, on the hearing, may go into the particulars.—*Estate of Hayden*, 146 Cal. 73, 79 Pac. 588, 589. Where the wards consist of a family of children, it is seldom possible to have accurate accounts kept, showing the exact expense on account of each child; but where the guardian has acted in good faith in expending money for the benefit of the wards, and the expenses thus incurred have not been unreasonable or excessive, he should be given the proper credit for the money actually so expended, although he may not be able to trace every item to the particular child. It is the duty of the court, if possible, to adjust the credits between the respective wards, if the evidence enables it to do so; but it is not justified in rejecting all of the credits because some of them are improper.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 460. If the account of the guardian is sworn to by another person, who has transacted the business of the guardian, and also by the guardian, who swears that he believes that such person's statements are true, the verification is sufficient.—*Racouillat v. Requeña*, 36 Cal. 651, 652, 655. The settlement of a guardian's account is a "proceeding," within the meaning of a statute which prescribes the time within which an action or proceeding is deemed to be pending.—*Cook v. Ceas*, 143 Cal. 221, 226, 77 Pac. 65. After wards have become of age for some time it is to be presumed that the guardian has made an accounting which has been approved by the court.—*First Nat. Bank of Winfield v. Bangs*, 91 Kan. 54, 136 Pac. 917. The arrival of a ward at

majority terminates the guardianship, except for the purposes of accounting and settlement with the ward.—*Rullman v. Rullman*, 81 Kan. 521, 106 Pac. 52. A guardian should present his final account for settlement upon the ward attaining majority.—*Miller v. Ash*, 156 Cal. 544, 105 Pac. 600.

(2) *Inventory and report.*—The statute requiring guardians to make an inventory and to report was enacted to be obeyed; it is a remissness of duty, where a period of more than thirteen years has elapsed without any report having been rendered by the guardian or required by the court.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661. Guardians should be required to file reports of their administration at regular periods; thereby lessening the burdens of the courts and protecting the interests of the wards.—*In re Troy*; *Beem v. Mays*, 79 Or. 247, 152 Pac. 103. Where a guardian not only failed, for more than thirteen years, to render the annual account required by statute or to make any inventory, but mingled guardianship funds with his own, giving checks for large amounts of his ward's money for purposes which he was unable to disclose, the court properly denied him compensation for his services.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661.

(3) *Duty to account.*—Under a statute authorizing the court to compel the guardian to render an account upon the application of "any person," it is not necessary that the person making such application shall have an interest in the estate. The court may therefore order the guardian to present his account on the application of a brother of the ward.—*Trumpler v. Cotton*, 109 Cal. 250, 254, 41 Pac. 1033. A ward may maintain a suit against the executor of his guardian.—*Ong v. Whipple*, 3 Wash. Ter. 233, 3 Pac. 898. When a ward attains the age of majority, the office of guardian comes to an end, and it is then the duty of the guardian, and one of the obligations of his bond, to exhibit a final account of his guardianship to the probate court, make a settlement with the probate judge or with the ward, and deliver up all the property in his hands belonging to the ward. Failure to do this constitutes a breach of his bond, for which he and his sureties are liable after settlement of the guardianship. Settlement of the final account of the guardian includes only transactions during the minority of the ward; it does not include transactions occurring after the ward has attained his majority. When that event happens, the court is *sui juris*; and the legal liability which attaches to him for any services rendered to him by his guardian arises, not out of the relation of former guardian and ward, but out of the contractual relation established by the transactions between them as contracting parties. Such a liability is not enforceable within the jurisdiction of a probate court; the remedy upon it lies, not in a probate proceeding, but in an action at law.—*In re Allier*, 65 Cal. 228, 3 Pac. 849, 850. Where a guardian has collected the moneys of his ward, used them, and does not attempt to account for them until forced to do so by the court many years later,

he is not entitled to anything more than the strict letter of the law allows him.—*In re Eschrich*, 85 Cal. 98, 102, 24 Pac. 634. It is the duty of a guardian to account for the funds of his ward received from a foreign jurisdiction, and there is no presumption that he has already accounted for them.—*In re Secchi*, Myr. Prob. 225. Where the court not only has jurisdiction of the subject-matter, but the statute designates specifically all the means by which it shall obtain jurisdiction of the person of the guardian, and such means have been observed, the guardian can not thwart the object of the law by failing or refusing to present his account. Hence if he has left the state, service may be made upon him by publication, and if, upon such service being made, he fails to file his account, the court may order it made up, audited, and settled from the evidence at hand; and a settlement so made will bind the sureties of the guardian.—*Trumpler v. Cotton*, 109 Cal. 255, 256, 41 Pac. 1033. A guardian is derelict in not accounting annually.—*Guardianship of Kalu*, 17 Haw. 517. The guardian's duties, the faithful performance of which are secured by his bond, include that of making an accounting.—*Gronna v. Goldammer*, 26 N. D. 122, 134, 143 N. W. 122. The guardian's duty is to keep a just and true account, which will disclose at all times, the source of every item of income and the purpose of every item of expense.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661. The guardian of a minor shall have the care and management of his estate until he shall have attained the age of 21 years, at which time the trust expires, whereupon it shall be the duty of the guardian "fully to account for and pay over to the proper person all the estate of said ward remaining in his hands."—*Lyons v. McElroy*, 104 Wash. 481, 177 Pac. 312. A guardian may acquit himself by an outside informal settlement with his ward, but the guardian who relies upon such a settlement must clearly show that he made a full disclosure of everything to his ward.—*Harrison v. Harrison*, 21 N. M. 372, L. R. A. 1916E, 854, 155 Pac. 356, 357. A guardian must account for all accumulations from the use of his ward's funds, and will, under no circumstances, be permitted to profit from their use. *In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661. Minors, the guardian of whose estates pays to them, under an order of court, a stated sum per month; which sums are received for them and disbursed by a trustee, is entitled to have such trustee account for the moneys received.—*Brown v. Lee* (Cal. App.), 175 Pac. 907. Where a guardian of minors, within little more than a year after his appointment, withdraws from his accounts as guardian, about thirty thousand dollars, in round numbers, and is asked, many years afterward as to the purpose for which he gave a particular check, it is no explanation for him to say, "I do not know"; that answer has no place in the response of one who deals with trust funds; it is his duty to be able to say for what purpose the money was used, and to present vouchers for it.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661.

(4) *Jurisdiction of courts.*—A final accounting presented by a guardian is properly addressed to the probate court that has jurisdiction of the estate of the ward.—*In re Allgier*, 65 Cal. 228, 229, 3 Pac. 849. The probate judge has exclusive jurisdiction to determine the state of accounts between guardian and ward.—*Allen v. Tiffany*, 53 Cal. 16. A probate court has authority to settle the accounts of a guardian of an infant after his letters are revoked.—*Graff v. Mesmer*, 52 Cal. 636, 637. In Oregon, the county court has jurisdiction to settle the accounts of a removed guardian, upon the petition of his bondsmen and that of the subsequently appointed guardian. Where the purpose of such a proceeding is merely to determine whether additional credits should be allowed, the removed guardian is not a necessary party, and it is not necessary to resort to a court of general equity jurisdiction for the purpose of determining whether such additional credit should be allowed.—*Cutting v. Scherzinger*, 40 Or. 353, 68 Pac. 393, 395. Under a statute which gives to a county court jurisdiction, in the first instance, to direct and control the conduct, and to settle the accounts, of executors, administrators, and guardians, such court has power to inquire into a case of devastavit, and to charge the amount thereof to the delinquent.—*Steel v. Holladay*, 20 Or. 70, 10 L. R. A. 670, 25 Pac. 69, 71. If, however, a ward, on attaining her majority, and after her marriage, has executed a release to her guardian, the county court has no jurisdiction thereafter to compel the guardian to account. In such a case, the ward must resort to equity to have the settlement set aside, if the county court is not a court of general equitable jurisdiction.—*Butterick v. Richardson*, 39 Or. 246, 64 Pac. 390, 392. It is within the province of the court to require guardians to settle the accounts of their wards, even after the letters of guardianship have been revoked.—*Title Guaranty & Trust Co. v. Hinkel*, 35 Okla. 128, 128 Pac. 696; *Driskill v. Quinn* (Okla.), 170 Pac. 495, 496.

(5) *Exceptions to account.*—In a statute which provides that, upon the hearing of an account, any person interested may appear and file his exceptions, in writing, to the account, and contest the same, the word "exceptions" is probably used with reference to the equity practice of filing exceptions to the report of a master in chancery. But, in the practice that has grown up in this state, the office of such exceptions has been much enlarged, and the word has come to include not only a statement in writing of the points or matters wherein the credits or charges in an account are claimed to be deficient, defective, or erroneous in law, but also a statement of any affirmative matters of fact not appearing on the face of the account, which, it may be claimed, requires additional charges in favor of the estate, or the rejection of credits claimed against it.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 456. If a person interested in an estate wishes to contest an account presented by an executor, administrator, or guardian, he must file his exceptions, in writing, to the account, setting out specifically the grounds of his objection; and at the hearing he

should be held limited to the exceptions so presented; but, without any objections, it is the duty of the court to carefully examine the account and to reject all unjust or illegal claims. Regardless of the filing of exceptions, the court has power, and it is its duty, to scrutinize the account, reject all errors therein, reject all items of credit which appear to be illegal or excessive, and generally to inquire into the truthfulness and accuracy of the items of charges and credits, and of the facts set forth in the accompanying report. And, in the course of such investigation, it may require and receive evidence to prove or disprove the several items and facts under inquiry, although no contest is made.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 456. A ward can not except to an investment made by his guardian, on the mere ground that it consists of a loan or personal security, where the statute authorizes the guardian to make the investment in any manner to the ward's interest.—*Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 154, 156. Where the report of a guardian is excepted to by his ward, and costs expended, outside of counsel fees, are awarded to the guardian in resisting the exceptions to a certain investment, and the guardian, on appeal, is surcharged with such investment, he should be allowed such costs; and if an exception to a certain investment is sustained, and other exceptions are dismissed, the ward should be allowed his costs, outside of counsel fees, in respect to the investment as to which the exception was sustained.—*Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 154, 164. It is no objection to a guardian's first account, that one year had not elapsed from the day of the appointment of the guardian.—*Estate of Hayden*, 146 Cal. 73, 79 Pac. 588. Where on the final accounting of a guardian of an Indian allottee, an exception is taken to allowing him credit for the payment of a certain sum of money in compromise of litigation, under an agreement with the ward, the validity of such contract will not be determined, where it was involved in a suit for specific performance.—*Terry v. Sicade*, 37 Wash. 249, 79 Pac. 789. If an executor is the duly appointed, qualified, and acting guardian of a minor heir, his two positions of trust are in direct antagonism, upon the question of property rights, where a legatee under the will objects to the executor's account upon the ground that he had a large sum of money and also personal property in his possession which was the property of the estate and for which he had not accounted; and if it were not for the prospective personal liability against him in one or the other of the estates, he should not be heard at all in such a proceeding, for, in representing both trusts, he would most likely misrepresent one.—*In re Haas*, 97 Cal. 232, 234, 31 Pac. 893. On the guardian's making his final report the ward may file objections to the same, or to any previous report made during the guardianship, and his exceptions, when they are filed, impose a duty upon the court to hear and determine the controversy raised, to have an accounting, and to render a judgment consistent with the facts and the law.—*Tilman v. Tilman* (Okla.), 177

Pac. 558. If the guardian of a minor takes notes with personal security only, without authority from the county court, to make the particular loan, and the notes are never presented to the county court for approval, the act of the guardian is at his own risk; and, if he is required to settle with successor, he can not complain that the latter refuses to be satisfied with such notes.—*Cabell v. McLish* (Okla.), 160 Pac. 592. The presence and assistance of an independent legal advisor, representing the ward, at the time of a settlement between the guardian and his ward, may, if the facts warrant, remove the imputation of undue influence by the guardian over the ward, but such independent counsel and advice will not relieve the guardian of the necessity of making a full disclosure, and, where a guardian settles with his ward and the ward is represented by counsel of his own selection, but the guardian fails to disclose facts not shown by his reports to the probate court, and of which the ward or his counsel have no knowledge, such settlement and a release obtained by the guardian will be set aside where it does not appear that the ward received substantially all that he was entitled to.—*Harrison v. Harrison*, 21 N. M. 372, L. R. A. 1916E, 845, 155 Pac. 356.

(6) *Admissibility of evidence.*—If a ward files exceptions to the final report of his guardian, concerning certain loans or investments, verbal advice of the district judge at the time of the transaction, and the advice of the guardian's counsel, are admissible in evidence to show the good faith of the guardian. Evidence of previous loans by the ward's father to the same person, on like security, is also admissible as showing prudence and good faith on the part of the guardian.—*Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 154, 158, 160, 161. In proceedings for the allowance of a guardian's account, the admission of evidence which is substantially injurious to the guardian must necessitate a reversal.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 457.

(7) *Proper charges against guardian. Interest.*—If a guardian allows himself to make a loan of his ward's money on lands in the neighborhood of his city, the value of which is largely speculative, based upon the proposition that it may become, in time, city property, and desirable and sought for as a site for city homes or factories, and takes as security for such loan a mortgage on such lands, he should be charged with the amount of the loan, and any interest received, but should be permitted to retain the securities as his own, and the judgment, by appropriate provision, should secure them to him.—*Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 154, 162, 163. When the guardian is required to make annual inventories and reports, interest may properly be computed annually for sums not reported.—*Scheib v. Thompson*, 23 Utah 564, 65 Pac. 499, 500. Where a guardian acts in good faith, does not make any use for himself of the funds of his ward, and makes no profit for himself, he can be charged with no more than the statutory rate of interest.—*Guardianship of Cardwell*, 55 Cal. 137, 142. A guardian is chargeable with compound interest

where he has collected money of his ward, used it, and has made no attempt to account for it until forced to do so by the court.—*In re Eschrich*, 85 Cal. 98, 102, 24 Pac. 634. If a guardian, in good faith, and for the benefit of his ward, purchases property, but the ward afterwards refuses to ratify, and disaffirms the purchase, the guardian is not answerable for compound interest. It is only where there has been intentional or wilful dereliction of duty on the part of the guardian that compound interest can be allowed.—*Estate of Cousins*, 111 Cal. 441, 452, 44 Pac. 182. Insurance-money collected by a guardian is no part of the estate. This money goes direct to the heirs. The executors of the estate should have nothing to do with it, and it is the duty of the guardian into whose possession it comes to deliver it to the heirs as they become of age, with interest upon the same from the date of its receipt by the guardian; and if the report of the guardian shows that he has allowed such a fund to become commingled and confused with the funds of the estate, and his accounts as guardian to become commingled and confused with the accounts of the executors, so that it is impossible for the court to determine out of what funds the expense of supporting the children was paid, the court is justified in concluding that the minor heirs had been supported from the funds of the estate, and that the insurance-money had been kept intact for the use of the beneficiaries.—*Hill v. Smith*, 8 Wash. 330, 35 Pac. 1070. If the guardian receives money of his wards, which he keeps for many years, and uses for his own purpose, and renders no account until cited to appear and account on the petition of his wards, he is properly chargeable with interest upon the money received, compounded annually, although he was guilty of no fraud in the use of his ward's money.—*In re Eschrich*, 85 Cal. 98, 101, 24 Pac. 634; *Estate of Hamilton*, 139 Cal. 671, 73 Pac. 578; *Glassell v. Glassell*, 147 Cal. 510, 82 Pac. 42; *Scheib v. Thompson*, 23 Utah 564, 65 Pac. 499, 500. So if he has invested such money in stock and bonds, which he has appropriated to his own use, he should not be credited with such stocks and bonds, but should be charged with the trust funds appropriated, at compound interest.—*In re Dow*, 133 Cal. 449, 65 Pac. 890, 892. The general rule now thoroughly well established in this state as to the limit of the liability of a trustee for mingling the trust funds with his own, and their use in his own business, where it is not shown that a larger profit was realized therefrom, is, the return of the principal, with legal interest thereon, compounded annually. This rule is applicable alike to guardians and executors as to other trust relations.—*In re Dow*, 133 Cal. 449, 65 Pac. 890, 892. If the settlement of the final account of the guardian is delayed after the ward arrives at age, there can be no valid objection to the guardian's voluntarily charging himself with legal interest on the balance in his hands, in the absence of evidence that he has received anything more.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454. Where there is unreasonable delay by the guardian in

making a final settlement after the ward is of age, the court, in settling the account, should charge the guardian at least the legal rate of interest annually on any balance he may have had on hand, when the ward arrived at age, unless there are circumstances absolving him from such charge.—Estate of Boyes, 151 Cal. 143, 90 Pac. 454, 457. A guardian is chargeable not only with rents actually received, but also with such additional rents as he would have obtained had he faithfully and diligently discharged his duties.—Guardianship of Hoare, 14 Haw. 443, 445. Where a guardian mixes the funds of his ward with his own, and does not keep any separate account, which is complete, reliable, and satisfactory, he is chargeable with interest upon the ward's money in his hands, which he has retained for a long period of years without investment.—Guardianship of Hoare, 14 Haw. 443, 444. A guardian will be surcharged with expenditures the necessity of which has not been shown.—Guardianship of Kalu, 17 Haw. 517, 519. A guardian who, without an order of court, lent the funds of his ward on an interest-bearing note, was properly directed to account for the interest due thereon at the date of final settlement, where the ward refused to accept the note, then due, in lieu of cash.—In re Allard Guardianship, 49 Mont. 219, 141 Pac. 661. If a guardian lends his ward's money on a note, and the ward refuses to accept the note, the guardian must account, not only for the principal, but also for the accumulations of interest.—In re Allard Guardianship, 49 Mont. 219, 141 Pac. 661. If a guardian mingles the funds of his ward with his own and is called to account but it is not shown by the record that he made any profit for himself out of the ward's funds while they were mingled with his own, the guardian is chargeable with interest at the legal rate, with annual rests, for the use of the funds during the period they were mingled with his own.—Luke v. Kettenbach, 32 Ida. 191, 181 Pac. 705. Where a guardian of two minors admitted that a loan made by him originally belonged to the estate of one of them, but that he transferred it, without order of court, to the account of the other, he was not in a position, on final settlement of the former's account, to complain of an order directing him to account to said minor for the interest earned on such loan from the date of the transfer to the date upon which it was paid.—In re Allard Guardianship, 49 Mont. 219, 141 Pac. 661.

(8) Credits allowable to guardian.—An attorney's fee for services rendered to the guardian of a minor, in pursuance of a written contract, is an expense incurred by the guardian in the performance of his duties, for which he is primarily liable; though if the probate court shall deem the expenditure reasonable and necessary to protect the interest of the ward, it may be allowed from the ward's estate.—Hunt v. Maldonado, 89 Cal. 636, 637, 27 Pac. 56. The money actually paid out by the guardian for court costs, attorneys' fees, and for recording deeds is properly allowed to him upon the settlement of his account.—Scheib v. Thompson, 23 Utah 564, 65 Pac. 499, 500.



A stepfather, who, as guardian, supports and maintains his stepchildren, is entitled to be credited, in the settlement of his accounts, as their guardian, with expenditures from the moneys of his wards for such purpose, where there is no doubt of the expenditures having been made, and the evidence shows that the guardianship funds were properly used for the support of the children.—*Cutting v. Scherzinger*, 40 Or. 353, 68 Pac. 393, 395. As a general rule, full items, with vouchers for all expenditures, should be required, and credits should not be allowed without them; but this is not indispensable, and, in a clear case, where there is no doubt of the expenditures having been made, or of the guardian's good faith, vouchers may be dispensed with. Each case must necessarily depend upon its own particular facts, and on the equities thereof.—*Cutting v. Scherzinger*, 40 Or. 353, 68 Pac. 393, 395. It is no objection to a guardian's account, that household expenses for the benefit of several wards, constituting one family, were apportioned numerically among the wards, without reference to differences of actual consumption. The slight inequalities that would occur between the different children with respect to food furnished, as well as many other things consumed in the household, would be more than compensated by the advantages of having the children reared as one family.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 460. If the guardian, after the ward becomes of age, has continued, as before, with the ward's knowledge and consent, to support him, or to pay out money for him out of the estate, received by the guardian during the minority of the ward, and there is nothing unfair or unjust to the ward in the transactions, the guardian should be allowed credit in his account, out of the estate, for the moneys thus applied to the ward's use. If he has overpaid the money in his hands, and other estate remains, he may be allowed a lien upon the estate for the overpayment, but he can not be given a personal claim against the ward for such overpayment in any case.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 458. If a guardian is compelled to pay a debt which he has contracted for the benefit of his ward, and it is one properly made on behalf of his ward, the county court will allow it out of the ward's estate; but the liability of the estate, in such a case, is one to be settled in the county court.—*Sturgis v. Sturgis*, 51 Or. 10, 131 Am. St. Rep. 724, 15 L. R. A. (N. S.) 1034, 93 Pac. 696, 699. If the guardian of a minor makes a valid contract with an attorney concerning the latter's fee, the guardian is liable, and if he pays it, and the probate court deems the expenditure reasonable, and necessary to protect the interests of the ward, it may be allowed from the ward's estate.—*Hunt v. Maldonado*, 89 Cal. 636, 637, 27 Pac. 56. If a guardian is negligent in collecting money for his ward, which money is thereby lost, the guardian is properly chargeable therewith in his final account.—*Anderson v. Anderson (Okla.)*, 165 Pac. 145. The allowance of an attorney's fee to a guardian is within the court's discretion, and, where that is not abused, the appellate court will not disturb the

amount fixed.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661. An allotment of an infant, without a legal guardian, living with his father, who is his natural guardian, having been leased by said natural guardian at the rate of 25 cents per acre per year for a period of five years, and for improvements to be made thereon, to consist of breaking land, building fences and houses benefiting such estate, such contract having been entered into in good faith by all parties thereto, believing it to be a substantially fair contract, and authorized under the law, said father, having afterward been appointed as legal guardian, repudiating said contract, the value of such improvements will be allowed out of the rents in an accounting.—*Muskogee Dev. Co. v. Green*, 22 Okla. 237, 97 Pac. 619. The guardian of an infant Indian, on a final accounting, is entitled to credit for an amount paid by him in compromise of litigation against the ward's estate, where such payment was made under order of court, because in view of the escape from litigation, the court can not say that the best interests of the estate were not conserved.—*Terry v. Sicade*, 37 Wash. 249, 79 Pac. 789.

(9) What is not to be allowed. Compensation. Attorney's fees.—The ordinary rule is, that a guardian will not be allowed for permanent improvements placed by him on a minor's property without authority.—*Gerber v. Bauerline*, 17 Or. 115, 19 Pac. 849. Where the guardian had agreed that, if appointed, he would maintain and educate the ward, which agreement was embodied in the order appointing him, items for maintenance of the ward should be disallowed.—*In re Barg*, Myr. Prob. 69. So items in a guardian's account, for the payment of board of his wards while living with their elder brother, many years before the presentation of the account, are properly disallowed, where there is no evidence that any fixed amount was agreed upon to be paid in the beginning, nor any evidence as to what the keeping of the wards was worth, or that it was worth anything over and above the value of their services.—*In re Eschrich*, 85 Cal. 98, 24 Pac. 634. And where a guardian, the father, has collected certain moneys of his ward, and has misappropriated them to his own use, he can not claim credit for expenses paid by him for the maintenance of the ward after such misappropriation.—*Guardianship of Ceas*, 134 Cal. 114, 66 Pac. 187. If the guardian has invested his ward's money in stocks and bonds, which he has appropriated to his own use, no credit should be given to him for the securities.—*In re Dow*, 133 Cal. 449, 65 Pac. 890. Where it appears from a statement in the guardian's account that his ward was not at home during a certain year, and did not receive the support claimed, the guardian should not be allowed a credit claimed for the ward's support during that year, as a member of the family, consisting of the ward's mother and brothers and sisters.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 458. A guardian is not entitled to any compensation, where he has been negligent in the management of his ward's estate.—*Scheib v. Thompson*, 23 Utah 564, 65 Pac. 499. The court may reduce the commissions of a

guardian for his neglect of duty.—Guardianship of Kalu, 17 Haw 517, 519. If he has been guilty of gross negligence in the performance of his duties, he is not entitled to any commissions.—Guardianship of Hoare, 14 Haw. 443, 448. As to post-majority transactions, it may be said that the guardian is not entitled to any allowance for the support of the ward after the latter becomes of age, particularly where it is impossible to segregate the expenses for support which are contracted before the ward became of age, and afterwards.—Hill v. Smith, 8 Wash. 330, 65 Pac. 1070. As the authority of the guardian ceases with the majority of the ward, he has no authority, after the ward's majority, to proceed with the foreclosure of a mortgage, without the ward's consent, and to bid in the property for the ward, and the fact that he does so, and compromises a deficiency judgment, does not raise the presumption that he continued so to act without the consent and approval of his ward.—Estate of Curtis, 121 Cal. 468, 53 Pac. 936, 938. There is some difference, however, as to the extent to which courts will consider post-majority transactions in the settlement of the accounts of a former guardian. This difference probably originated from the fact that the accounts were generally settled by courts of equity, whose jurisdiction was not so limited. It is clear, however, that a guardian contracts that, at the termination of his trust, he will account for the property, estate, and moneys of the ward in his hands, and will pay over and deliver such property as remains to the person entitled thereto. This is the account which the probate court has jurisdiction to determine. No jurisdiction is given to ascertain a balance against a former ward, except as it will tend to show what the guardian must pay or deliver to his former ward. It is in the nature of a proceeding in rem, and the estate in the res, and, after majority, the only matter of which the court has jurisdiction.—Estate of Kincaid, 120 Cal. 203, 52 Pac. 492, 493. If a guardian is an attorney at law, and performs professional services for his ward, he may be allowed extra compensation therefor.—Guardianship of Humeku, 15 Haw. 394, 395. A guardian who brings suit for the ward's estate must look to the probate court for the allowance of attorneys' fees.—Magoon v. Brash, 11 Haw. 204, 206. Attorneys' fees are recognized, in guardianship matters, as proper items of expense, when the services of attorneys are reasonably required; but the burden is on the guardian to show the necessity for the employment of an attorney, and the reasonableness of the fees paid to him; and the allowance should never exceed the amount actually paid.—Luke v. Kettenbach, 32 Ida. 191, 181 Pac. 705. A guardian is not entitled in his final account to charge the estate of his ward with attorneys' fees, witness fees, and expenses incurred in defending himself against removal.—In re Cobb's Estate (Okla.), 166 Pac. 885. The law provides that a guardian is to have such compensation for his services as the court in which his accounts are settled deems just and reasonable; but of course a faithful steward-

ship is contemplated and while a mere technical breach of duty which does not result in injury to the ward's estate will not ordinarily justify a court in withholding compensation altogether, a flagrant violation of the duties of the trust will do so.—*In re Allard Guardianship*, 49 Mont. 219, 225, 141 Pac. 664. In the settlement of accounts between guardian and ward where the guardian was the ward's stepfather and previous to his appointment as guardian had paid for the care and support of his stepchild out of his own means without any expectation of ever being reimbursed, none of such expenses should be allowed, but only expenses incurred after he was appointed legal guardian.—*In re Harris*, 16 Ariz. 1, Ann. Cas. 1916A, 1175, 140 Pac. 828. The trustee of minors, who accepts for them and disburses monthly payments, made, under order of court, by the guardian of their estates, is by statute, entitled to the same compensation as an executor.—*Brown v. Lee* (Cal. App.), 175 Pac. 907. A guardian's compensation under the Idaho statute is not to be determined on the basis of fees and commissions, but is to be in such amount as the court deems just and reasonable.—*Luke v. Kettenbach*, 32 Ida. 191, 181 Pac. 705. Mere mistakes in keeping accounts with the estate, where no fraud is shown, do not forfeit a guardian's right to compensation for his services.—*Rogers v. Lindsay*, 89 Kan. 180, 417, 131 Pac. 150.

(10) **Death of ward before settlement.**—If the ward dies before settlement of the guardian's account, such settlement must be made with the ward's legal representative. It is always in the power of the guardian to procure the appointment of an administrator with whom he may settle the account, and who will then be in existence to receive constructive notice; and the full statutory period of posting must run while the person against whom the notice is directed is in legal existence and capable of receiving such knowledge; otherwise there will not be the full statutory notice to him, and jurisdiction of the proceedings will be lacking. The existence of the legal representatives during the entire period required to make that form of service valid is necessary to raise the statutory presumption that he has obtained from such notice a knowledge of the pendency of the proceeding. Neither is the record, nor is the recital of the giving of the notice, nor are the presumptions in favor of the jurisdiction of the court, conclusive of the fact of the existence of the administrator, as such, during the whole or any part of the prescribed time for notice; and where the actual effective time of the notice to the administrator was only seven days, where the law required ten days to constitute legal service, jurisdiction to hear the settlement of the guardian's account was wanting, and an order settling such account was therefore void.—*Livermore v. Rattl*, 150 Cal. 458, 89 Pac. 327. Where an order is made by the county court confirming a guardian's sale of real estate, and on appeal to the district court the judgment of the county court is sustained and an appeal is then taken to the supreme court and the judgment below superseded, and where pending

the appeal the ward dies, the proceedings can not longer be sustained and should be dismissed.—*In re Bohanan*, 37 Okla. 560, 133 Pac. 45.

(11) **Conclusiveness. Attacking settlement.**—If the statute does not provide that the settlement of a guardian's intermediate account shall be conclusive, such settlement is merely *prima facie* evidence of its correctness, and it is afterwards open to inquiry.—*Guardianship of Cardwell*, 55 Cal. 137, 142. But a decree settling the final account of a guardian is conclusive not only against the guardian himself, but also against his sureties, until it is reversed or modified by some proceeding directly impeaching it.—*Brodrig v. Brodrig*, 56 Cal. 563, 565. Items contained in the settled accounts of a guardian, and the order settling them, can not be reconsidered in a suit in equity to set aside the order settling the account of a guardian for fraud and to compel a proper accounting.—*Guardianship of Wells*, 140 Cal. 349, 353, 73 Pac. 1065. In a suit in equity to set aside the order settling the account of a guardian for fraud and to compel a proper accounting, and where the gist of the petition is as to fraud upon the part of the guardian in failing to account to the court, or to his ward, for rent-moneys belonging to the ward's estate, the allegations of the petition are insufficient, where they are of the most general character, and do not allege the particulars, or the facts, or circumstances constituting the alleged fraud.—*Guardianship of Wells*, 140 Cal. 349, 73 Pac. 1065. If a petition in the nature of a suit in equity is filed to set aside an order settling the account of a guardian for fraud, and to compel a proper accounting, and no objection is raised to the form of the petition, and the guardian waives an objection to the jurisdiction of his person by answering such petition, the court obtains jurisdiction of the person, and has jurisdiction of the subject-matter, and the petition will be deemed a bill in equity invoking the equitable powers of the court, notwithstanding the form in which it is entitled. It is true that the probate and the equity jurisdictions of the superior court are separate and distinct, yet the same tribunal exercises them both.—*Guardianship of Wells*, 140 Cal. 349, 352, 73 Pac. 1065. Where a guardian omits, by mistake or inadvertence, from his account filed in the probate court, a small amount which he has collected for his ward, but it appears that such omission was not done with the intention of defrauding or injuring his ward, and the guardian gains no pecuniary advantage thereby, as proved by the fact that the sum omitted is shown to have been used for the benefit of the ward, such omission establishes no actual or constructive fraud.—*Purslow v. Brune*, 43 Kan. 175, 23 Pac. 105. A guardian's final settlement made in the probate court can not be collaterally attacked.—*Davis v. Hagler*, 40 Kan. 187, 19 Pac. 628. Where an order of settlement and discharge of a guardian was made without notice to, or knowledge of, the wards and the guardian's accounts had neither been settled by the court nor between the guardian and his wards and the guardian continued to hold himself out as guardian, the settlement and discharge were

therefore *ex parte* and determined nothing as between the guardian and his wards.—*Sroufe v. Sroufe*, 74 Wash. 639, 134 Pac. 473. A guardian will not be permitted to testify in a manner to impeach the final settlement of his guardianship accounts, regularly made by the court.—*Title Guaranty & Trust Co. v. Slinker*, 35 Okla. 128, 128 Pac. 696. A person who receives from the guardian of the estates of minors, and disburses, monthly payments made them under order of court, is not bound by an account rendered by the guardian, and is not chargeable with the allowances until he receives them, by which act he undertakes a trust.—*Brown v. Lee* (Cal. App.) 175 Pac. 907. When a guardian files an account and upon a hearing the county court fixes by decree the amount due by the guardian to his ward's estate, decrees his removal for gross mismanagement and incompetency, the sureties on his bond are concluded, in the absence of fraud, by such decree, whether the account so settled is denominated an annual or a final account.—*Egan v. Vowell* (Okla.), 167 Pac. 205, 206. The decree of settlement by a guardian may, upon proper application by a party vested with an interest in the ward's estate, be subjected to amendment.—*State (ex rel. McHatton) v. District Court*, 55 Mont. 324, 176 Pac. 608. The settlement of a guardian's intermediate accounts should not be held to be conclusive, unless explicitly so made by statute.—*Luke v. Kettenbach*, 32 Ida. 191, 181 Pac. 705. The settlement of a guardian's annual or intermediate accounts is only *prima facie* evidence of its correctness; the statute relative to the conclusiveness of an administrator's account has no application to the annual or intermediate accounts of a guardian.—*Luke v. Kettenbach*, 32 Ida. 191, 181 Pac. 705. The allowance, approval, and settlement, by a probate court, of the annual or intermediate accounts of a guardian are not final and conclusive against the ward, but may be re-examined by that court on the final accounting of the guardian.—*Luke v. Kettenbach*, 32 Ida. 191, 181 Pac. 705. The district court of Montana has jurisdiction, under the statute, over the subject-matter of the account of a guardian, and may decree a settlement; and its decree is not void because of the fact that the court erroneously determined matters foreign to what was then before it; but, after exercising its jurisdiction by rendering such decree, it is without power, of its own motion, to set that decree aside.—*State (ex rel. McHatton) v. District Court*, 55 Mont. 324, 176 Pac. 608. A guardian may acquit himself by an outside informal settlement with his ward, but the guardian who relies upon such a settlement must clearly show that he made a full disclosure of everything to the ward.—*Harrison v. Harrison*, 21 N. M. 372, L. R. A. (N. S.) 854, 155 Pac. 356. The court's approval and settlement of a guardian's annual account is not final and conclusive upon the ward; it is only *prima facie* evidence of the correctness of the account, which is subject to re-examination upon the hearing of the guardian's final account.—*In re Cobb's Estate* (Okla.), 166 Pac. 885. The periodical or partial settle-

ments of guardian's are, at most, after approval by the court, but prima facie evidence of their correctness and may be rectified or rebutted on a final accounting. They are not settlements but only the exhibition of accounts, nor judgments, being merely ex parte presentations of the status of the estate in the hands of the guardian.—*American Bonding Co. v. People*, 46 Colo. 460, 104 Pac. 83. The term "final accounting" or "final settlement" implies an accounting or settlement after the severance of the relationship between guardian and ward and unless an event has transpired which causes such severance, a settlement can not be final. The reason of the rule is that the liability of the guardian extends beyond the time of the settlement.—*American Bonding Co. v. People*, 46 Colo. 460, 104 Pac. 83. A settlement made under the Colorado statute is a final account regularly made and constitutes a judgment conclusive between the ward on one side and the guardian and surety on the other unless impeached in the court in which it was rendered by proof of fraud or such other defects as would invalidate judgments of other courts.—*American Bonding Co. v. People*, 46 Colo. 460, 104 Pac. 83. Decrees in probate proceedings, including those relative to the settlement of guardians, are not, technically speaking, judgments, but the mode of review applicable to judgments is by the statute made applicable to many of them, and a trial court has no greater power over these than it has over formal judgments.—*State (ex rel. McHatton) v. District Court*, 55 Mont. 324, 176 Pac. 608.

#### REFERENCES.

Relief in equity from orders settling accounts of guardian.—See note 106 Am. St. Rep. 641.

(12) Discharge of guardian.—If a receipt is given by a ward, after he has reached his majority, to his guardian, on a settlement, as a release of all indebtedness, it will not be set aside when it appears that the settlement was made with the full knowledge of all the facts involved therein.—*Davis v. Hagler*, 40 Kan. 187, 19 Pac. 628. A petition of the ward, filed in the district court, asking relief of the guardian, which avers that with such receipt the guardian fraudulently obtained a release in the probate court, does not state a cause of action. A final settlement, so made in the probate court, can not be attacked collaterally.—*Davis v. Hagler*, 40 Kan. 187, 19 Pac. 628. It is error for the court to discharge an accounting guardian upon payment of the balance to another person, designated as guardian of the wards, if it does not appear that any order was made removing the accounting guardian, or appointing such designated guardian in his place, or as an associate with him.—*Estate of Boyes*, 151 Cal. 143, 90 Pac. 454, 460. A guardian may settle with his ward the day after he comes of age, and obtain his release, but he can not have a decree of court confirming the settlement and release until the ward has had a year to consider whether he will affirm or repudiate it.—*Cook v. Ceas*, 143 Cal. 221, 229, 77 Pac. 65. The marriage of a female

ward, under guardianship as a minor, terminates the guardianship, and operates, by force of the statute, as a legal discharge of her guardian. After such event the probate court retains jurisdiction over the guardian merely for the purpose of compelling him to account, and of settling his administration as guardian.—*Ex parte Pahia*, 13 Haw. 575, 579. A regular appointment of a guardian gives the court jurisdiction over the person and estate of the ward and such jurisdiction continues until the ward attains his majority, when the right of the court or guardian to manage the estate and the person of the ward ceases. If a ward has attained majority when the final account of a guardian is filed, no guardian ad litem is necessary or proper. His personal appearance is sufficient to give the court jurisdiction and where the ward appears on the application for discharge and the hearing on the guardian's final report and it then appearing to the court that the ward had arrived at full age the court had jurisdiction to enter an order of final discharge and cast the burden thereafter upon the ward to manage his own estate. If, therefore, in another proceeding it should be subsequently shown to the court that its finding as to the arrival of the ward at full age was erroneous such finding is not void but voidable only and is binding on the ward and those in privity with him until vacated or set aside for fraud or for error.—*Meeker v. Mettler*, 50 Wash. 473, 97 Pac. 508. The presence and assistance of an independent legal advisor, representing the ward, at the settlement between guardian and ward, may, if the facts warrant, remove the imputation of undue influence, but it will not relieve the guardian of the necessity of making a full disclosure, and where he fails to disclose facts not shown by his reports to the probate court, and of which the ward and his counsel have no knowledge, the release and settlement thus made will be set aside, where it does not appear that the ward received substantially all he was entitled to.—*Harrison v. Harrison*, 21 N. M. 372, L. R. A. (N. S.) 854, 155 Pac. 356, 358. Sections 3339-3341, Rev. Laws of Oklahoma, 1910, providing that a guardian appointed by a court is not entitled to his discharge until a year after his ward's majority, does not have effect to extend the time for the termination of the relationship beyond majority, but merely provides a period for the orderly review of the acts of the guardian during the guardianship, and the settlement of his accounts.—*Williams v. Canary* (Okla.), 249 Fed. 344, 346. The eighth subdivision of section 464 of Remington's Code of Washington has no application to an order discharging a guardian and settling his final account, entered without notice to, or knowledge of, his ward, especially where the guardian, after such order, continued to hold himself out as guardian; such settlement and discharge were ex parte and determined nothing as between the guardian and his ward; such an order is void for lack of jurisdiction, and may be vacated at any time.—*In re Sroufe's Estates*, 74 Wash. 639, 643, 134 Pac. 471. The petition, in an action by a ward against a former guardian and his surety,



charging that an order of the county court approving the final report of such guardian discharging him and releasing the surety from further liability was procured by fraud, is a direct attack upon such order.—*Brewer v. Dodson* (Okla.), 159 Pac. 329.

(13) *Death of guardian before settlement.*—If the guardian dies after the ward attains his majority without having presented it, his personal representative can not, in the absence of statute, make presentation in his stead.—*Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. If a guardian dies without having made an accounting and settlement in the county court of his affairs as guardian, his former wards may maintain an action in the superior or district court against his personal representatives and the sureties on his bond as guardian for such accounting and settlement; and, in the exercise of its jurisdiction, the superior court may determine the balance due and render judgment therefor.—*Donnell v. Dansby*, 58 Okla. 165, 159 Pac. 317; *Asher v. Stull* (Okla.), 161 Pac. 808. Where a guardian dies without an accounting and settlement of his affairs as guardian in the county court, his wards may maintain an action in the superior or district court against his personal representatives and the sureties on his bond for an accounting and settlement.—*Title G. & S. Co. v. Burton* (Okla.), 170 Pac. 1170, 1171. Where a guardian dies without an accounting and settlement of his affairs as guardian having been made in the county court, such accounting and settlement can only be had in a court possessing the power and jurisdiction of a court of equity, by a proceeding against the necessary parties.—*Title G. & S. Co. v. Burton* (Okla.), 170 Pac. 1170, 1171. Where a father who had been appointed guardian of his minor children made no charge against them for moneys expended in their behalf, and obtained no authority of the county court to expend moneys belonging to them, no credits can be allowed therefor after his death in an action against the sureties upon his bond.—*Donnell v. Dansby*, 58 Okla. 165, 159 Pac. 317.

#### REFERENCES.

Method of compelling settlement of accounts with deceased guardian.  
—See note 8 Am. St. Rep. 684.

#### 14. Collateral attack.

(1) *What constitutes.*—Where in an action to recover possession and to quiet title to lands, the plaintiff, in order to establish title in himself, assailed the record of the county court appointing a guardian for him, who, as such, pursuant to an order of the court, thereafter conveyed the lands in suit to the grantor of the defendant, it is held that such action constituted a collateral attack.—*King v. Shults* (Okla.), 180 Pac. 550; *King v. Mitchell* (Okla.), 171 Pac. 725, 726.

(2) *What may be so attacked.*—The judgment of a probate court appointing a guardian, which is void for want of jurisdiction, may be attacked collaterally in an action brought by a person claiming under

such appointment.—*Modern Woodmen v. Hester*, 66 Kan. 129, 71 Pac. 279. A guardian of the person of a minor duly appointed by a superior court is legally entitled to the custody of the minor, and the guardian's right to such custody can be attacked collaterally only upon the ground of want of jurisdiction in the superior court to make the order of appointment; and when, upon proceedings in habeas corpus, the guardian justifies his custody of the minor by such an order, an impeachment thereof is a collateral attack.—*In re Lundberg*, 143 Cal. 402, 77 Pac. 156, 157. An order of court, valid on its face, can be questioned only in a direct proceeding; but an order plainly invalid, as indulging a guardian in his purpose to enjoy personally funds of his ward, may be impeached by objection to the final report.—*In re Bates' Guardianship* (Okla.), 174 Pac. 743. Notwithstanding the rule that orders of a court of record, valid on their face, can not be attacked collaterally, where proceedings in the administration of a ward's estate by his guardian are so irregular and unconscionable as to carry with them the badge of fraud, an order approving them is vulnerable to attack by objections to the guardian's final account.—*In re Bates' Guardianship* (Okla.), 174 Pac. 743.

(3) What is not subject to.—It is a well-settled rule that a judgment, regular on its face, and rendered by a court having jurisdiction to render it, can not be attacked collaterally on the ground of fraud, collusion, or other matter aliunde. And the appointment of a guardian by a probate court is a judgment to which such rule applies; and the rule applies to infants, as well as to adults.—*Hodgdon v. Southern Pac. R. Co.*, 75 Cal. 642, 17 Pac. 928, 931. If letters of guardianship have been issued and recorded in the probate judge's office, and the guardian has given a bond and duly qualified and entered upon the discharge of his duties as guardian, with the approval of the probate judge, and all this is of record, the guardian's acts will be held valid when attacked collaterally, although there may not be any further record in the probate judge's office of his appointment.—*Howbert v. Hyle*, 47 Kan. 58, 27 Pac. 116. Thus in a suit to foreclose a mortgage, a collateral attack can not be made upon the validity of a petition to mortgage the property of minor heirs to raise a certain sum of money, on the ground that the petition which sets forth the items for which the money is wanted contains some items not chargeable against the estate. In such a case the petition is not void on its face, but is merely irregular.—*Howard v. Bryan*, 6 Cal. Unrep. 547, 62 Pac. 459. There can be no collateral attack on a judgment directing the sale of a ward's property where such judgment is founded upon a proper petition.—*Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537. The act of a guardian is ratified by his ward, unless the latter expressly disaffirms it within reasonable time after attaining his majority.—*Brazee v. Schofield*, 2 Wash. Ter. 209, 3 Pac. 265. The judgment of a county court appointing a guardian, and thereafter ordering a sale of the minor's land, both the judgment and the proceedings leading up to it being regular

upon their face, can not be collaterally attacked in an action of ejectment by the minors to recover the land, upon the ground that the minors at the time the guardian was appointed were not residents of the county in which the guardian was so appointed.—*Scott v. Abraham* (Okla.), 159 Pac. 270. An order of the county court transferring a guardianship cause to the county court of another county in the same state can not be collaterally attacked; the presumption is that the court, before making the order of transfer, performed its duty and found the facts justifying the order to be true.—*Southwestern Surety Ins. Co. v. Taylor* (Okla.), 173 Pac. 831. An order of court approving an expenditure by a guardian can not be proved by oral evidence in a collateral proceeding.—*In re Bates' Guardianship* (Okla.), 174 Pac. 743. Where the presumption in support of the validity of the appointment of a guardian may be properly indulged that, even though the records fail to show that the statutory notice was given to the person in charge of the minor, or to a relative residing in the county, evidence was taken by the judge, from which it appeared that the minor, being 18 years old, was not in charge of any person, and that he had no relatives residing in the county, and that the notice could not therefore, be given, and such appointment can not be attacked collaterally, by evidence aliunde to the contrary effect.—*Baker v. Cureton*, 49 Okla. 15, 150 Pac. 1090, 1092. Where the record of the county court in a guardianship proceeding is silent relative to the competency of a person appointed as guardian, it will be presumed that in making the appointment, the court, in the proper discharge of its duty, upon inquiry, adjudged that the person designated as guardian possessed all the requisite qualifications; and such judgment, being that of a court of general jurisdiction, is not subject to collateral attack, and it may not be impeached by evidence aliunde.—*King v. Shults* (Okla.), 180 Pac. 550. Where the order of the probate court in appointing a guardian recited that notice to relatives had been given as provided in the statute, the order of appointment is conclusive on collateral attack.—*Rice v. Theimer*, 45 Okla. 618, 629, 146 Pac. 702. An appointment of a guardian is not void and susceptible of collateral attack, merely because the petition for appointment fails to state that the residence of the minor is in the county where the petition is presented, as the statute provides.—*Rice v. Theimer*, 45 Okla. 618, 629, 146 Pac. 702.

#### REFERENCES.

Collateral attack upon appointment of guardian.—See ante, subd. 1 (11).

#### 15. Jurisdiction of courts.

(1) In general.—The old district courts of California, corresponding with the present superior courts, had the same control over the persons of minors, as well as their estates, that the courts of chancery in England possess. This jurisdiction was conferred by the constitution, and could not be divested by any legislative enactment.—*Wilson v.*

Roach, 4 Cal. 362, 366. The present superior courts have general jurisdiction of the matter of appointment of guardians, and, as an incident to this jurisdiction, they must have the power to hear and determine the fact whether a testamentary guardian has been legally appointed or not. If it should appear, however, that a guardian has been legally appointed by a will or deed, such courts would have no jurisdiction to appoint a guardian, as the court provides that the superior court may appoint guardians of minors who have no guardians legally appointed by will or deed.—*Murphy v. Superior Court*, 84 Cal. 592, 596, 24 Pac. 310. A superior court has jurisdiction to deprive a parent of the custody of his child, by the appointment of a guardian therefor, under proper circumstances, and the authority of the parent ceases upon the appointment of such guardian.—*In re Lundberg*, 143 Cal. 402, 77 Pac. 156. The probate court of the county of a minor's domicile is the court having jurisdiction to appoint a guardian of the person or estate of the minor. To permit a probate court, other than the probate court of the county of the minor's domicile, to take jurisdiction of his person and estate would be legislation discriminating against the minor.—*Connell v. Moore*, 70 Kan. 88, 109 Am. St. Rep. 408, 78 Pac. 164, 166. If one of two guardians appointed by will dies, and the other resigns and is discharged, the court has jurisdiction to appoint a guardian as if no appointment had been made by will.—*In re Henning's Estate*, 128 Cal. 214, 79 Am. St. Rep. 43, 60 Pac. 762, 763. A superior court has jurisdiction of a proceeding for the appointment of a guardian for the persons and estates of certain minor children after their mother's death, though their father may still be alive.—*Russner v. McMillan*, 37 Wash. 416, 79 Pac. 988. Where the superior court of one county has acquired jurisdiction to hear and determine the question of the residence of a minor, the need of a guardian, and the propriety of appointing the petitioner, it can not be deprived of this jurisdiction by subsequent proceedings in another county of the state for the issuance of letters of guardianship.—*Guardianship of Banneker*, 67 Cal. 643, 645, 8 Pac. 514. Probate courts have jurisdiction to appoint a guardian for minors domiciled in this state, and, after having made such appointment, they retain jurisdiction for all purposes connected therewith until the guardian's accounts are rendered and he is legally discharged. Hence, the unauthorized removal of the wards from the jurisdiction of the domicile to another state, or the appointment of a guardian by a court of foreign jurisdiction, does not oust such probate courts of the jurisdiction which they have once acquired. So if the wards are domiciled within this state, and their only property, consisting of certain insurance policies, is within the state, the probate court has jurisdiction to appoint a general guardian, and to direct and control his conduct as such guardian.—*In re Brady*, 10 Ida. 366, 79 Pac. 75, 76. If a guardian of wards domiciled in this state obtains an order of court permitting him to remove them to another state, "there to remain until the further order of the court," and subsequently he is discharged

without being required to return the wards to this state, the domicile of the wards continues to be in this state, as they are incapable of changing their domicile, and such order indicates no intention to surrender jurisdiction of their persons.—*In re Henning's Estate*, 128 Cal. 214, 79 Am. St. Rep. 43, 60 Pac. 762, 764. It is made by statute the duty of the court to appoint the father or mother of the minor, "if found by the court competent to discharge the duties of guardianship"; but, under this provision, and under the general law, the prima facie presumption is that the parent is competent. Hence, the court is not authorized to appoint another as guardian, unless it finds that the parent is not competent. The fact of the competency or incompetency of the parent is the controlling question in the case, and the court is to be guided by what appears to be for the best interests of the child in making the appointment. If the parent is found to be competent, the court has no discretionary power to appoint another as guardian.—*Campbell v. Wright*, 130 Cal. 380, 62 Pac. 613, 614. In California a court has no jurisdiction to appoint a guardian for minors who are absent from the state, although their domicile may be within it.—*De la Montanya v. De la Montanya*, 112 Cal. 131, 44 Pac. 354. It is the guardian, and not the court, who is made responsible for the proper administration of his trust. He it is to whose custody the property of the ward is intrusted, and to him the law and the ward alike look for its safe return. In the performance of his duties, he is, it is true, in certain respects, under the control and supervision of the court appointing him; but this right of supervision does not carry the power to interfere with the custody and general management of the property of the ward, except, of course, for conduct authorizing suspension or removal. The court, therefore, has no authority to direct the guardian to deposit assets of the ward's estate in a certain institution, from which they shall be withdrawn only upon the order of court. Such an order practically places the custody and control of such assets in the hands of the court, exclusive of the guardian; and it is therefore in excess of the power of the court and void.—*De Greayer v. Superior Court*, 117 Cal. 640, 59 Am. St. Rep. 220, 49 Pac. 983, 985. Nor is such an order authorized by a statute which provides that the court, on application of the guardian, may authorize and require the guardian to invest the ward's money, and which authorizes the court to make such other orders and to give such directions as are needful for the management, investment, and disposition of the estate and effects as circumstances require.—*De Greayer v. Superior Court*, 117 Cal. 640, 59 Am. St. Rep. 220, 49 Pac. 983, 985. Nor does a probate court have jurisdiction to settle accounts of the guardian and to render judgment against the ward for advances made by the guardian after the ward attains his majority, although there was an agreement between them that the guardianship should continue, and that the advances should be made as guardian, where it is conceded that at the time the ward reached his majority there was no estate belonging to him in the

hands of the guardian.—*Estate of Kincaid*, 120 Cal. 203, 52 Pac. 492, 493. Nor does a probate court have authority to entertain an application by the creditor of a guardian of minor children for the allowance, against the estate of the wards, of a judgment of the district court, rendered against the guardian, on a contract made by him in carrying on a general mercantile business with the ward's money, nor authority to order the payment of such a judgment in such a proceeding; and the violation of such an order does not constitute a breach of the guardian's official bond.—*Harter v. Miller*, 67 Kan. 468, 73 Pac. 74. Neither is a probate court authorized to entertain a petition for an order to compel the guardian of the estate of a minor to refund moneys advanced, even by the guardian of the person of the minor, for his support and education. Nor is the court authorized to make an order, on the application of the minor himself, to compel the guardian to advance out of the estate of the minor the necessary sums for his support.—*Swift v. Swift*, 40 Cal. 456, 458. A court has jurisdiction though an action was brought, in form, against a guardian, as such, instead of against the ward by name.—*United States F. & G. Co. v. Howell*, 74 Wash. 596, 599, 134 Pac. 490.

## REFERENCES.

Jurisdiction of courts.—See note, post, on that subject, following table after § 216.

(2) County courts of Oklahoma.—If the county court in Oklahoma makes an order authorizing a guardian to purchase a tract of land with funds of his ward, and a warranty deed therefor is taken in the name of the ward, but the vendor afterwards sues to have the deed declared an equitable mortgage, the vendor is not conclusively bound by the records of the county court in the action instituted by him in the district court to have the deed declared a mortgage.—*Voris v. Robbins*, 52 Okla. 671, 153 Pac. 120. If allotted and inherited lands of a minor Creek freedman allottee are sold and converted into money by his guardian, through the medium of the county court, there occurs a mere change in the form of such property, which is still charged with the trust, and it remains subject to the jurisdiction of that court during the minority of the ward as defined by congressional enactment and as shown by the enrollment records.—*Brewer v. Dodson* (Okla.), 159 Pac. 329. The county court is without power to allow, by its order, a guardian to lend money to himself out of the ward's estate, either by direct act or by subterfuge.—*In re Bates' Guardianship* (Okla.), 174 Pac. 743. Until a minor is of age all judgments and orders affecting his estate, sleep in the bosom of the court and do not become final, no appeal being taken, at the expiration of the term, but may be modified, vacated or set aside, during minority, upon proper notice and for good cause shown.—*In re Hickory's Guardianship* (Okla.), 182 Pac. 233, 237. Theoretically speaking, a minor has no capacity at all to judge what is best for him or his estate; but, properly speaking, when the minor is of an age approaching majority, he or she may suggest facts and

views of policy worthy of consideration, and such facts should be given weight by the court in exercising its discretion.—*In re Hickory's Guardianship* (Okla.), 182 Pac. 233, 236-237. When the county court has once acquired jurisdiction lawfully in a guardianship matter, its jurisdiction thereafter does not depend upon the duration of the tenure in office of the person appointed.—*Crosbie v. Brewer* (Okla.), 158 Pac. 388, 392.

#### REFERENCES.

Jurisdiction of courts.—See note, post, on that subject, following table after § 216.

16. Jurisdiction of equity.—One who wrongfully intermeddles with the property of an infant is sometimes held in equity to be a guardian, but only (as in the case of an administrator *de son tort*) for the purpose of an accounting; he acquires none of the rights of a guardian.—*Aldrich v. Willis*, 55 Cal. 81, 85. Every alienation of the property of the ward, if made by the guardian without order of court, is void. Hence, a guardian can not subject the estate and property of his ward to a lien for legal services, without first obtaining an order of court authorizing him to do so. If a ward can not enter into a valid contract, without first obtaining an order of the probate court, for repairs and improvements of buildings on property belonging to him, surely a guardian without such authority can not enter into a contract for the employment of legal services, so as to bind the ward, or in any way affect his property. The power of guardians over the estate of the ward, the same as the powers of executors and administrators, can not be exercised, except according to the provisions of law and under the orders of the court which has jurisdiction of the estate.—*Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896, 898. It is undoubtedly true that the probate court has, as a general rule, exclusive jurisdiction to compel a defendant to account as guardian, and that its decree settling his accounts and discharging him from his trust is final and conclusive; but this rule does not apply in cases of fraud, for the reason that the matters in controversy may not have been passed upon in the settlement, particularly where the guardian is charged with having intentionally and fraudulently concealed from the court and his ward the fact that the latter had then, or ever had, any interest in the property in question. The settlement of a guardian's account in the probate court can not shield him from afterwards being called upon in a court of equity to account for property concealed by him.—*Lataillade v. Oreña*, 91 Cal. 565, 576, 25 Am. St. Rep. 219, 27 Pac. 924. Although property, which was under the control of a testator, as guardian, may have come into the hands of executors, yet the guardianship was a personal trust, which would not pass to them on the death of the testator, and the property held by him as guardian does not become assets in their hands to be administered. They merely hold it for its preservation until the persons whose estate it is, and for whose benefit it is held, can obtain a settlement of the trust, terminated by the death of the trustee,

in the proper forum, where the rights of all parties to the trust may be definitely determined. This settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and other necessary parties.—*In re Allgier*, 65 Cal. 228, 230, 3 Pac. 849. Settlement of the final account of the guardian includes only those transactions had during the minority of the ward. It does not include transactions occurring after the ward has attained his majority. When that event happens, the ward is *sui juris*; and the legal liability which attaches to him, for any services rendered to him by his guardian, arises, not out of the relation of former guardian and ward, but out of the contractual relation established by the transactions between them as contracting parties. Such a liability is not enforceable in probate courts; the remedy upon it lies, not in a probate proceeding, but in an action at law.—*In re Allgier*, 65 Cal. 228, 229, 3 Pac. 849. A guardian can not apply to a court of equity for leave to sell property of the ward but must make the application to the court from which he received his appointment of guardian.—*Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640. Relation of guardian and ward is confidential and is subject to provisions of title on trusts.—See *Rev. Codes of Montana*, §§ 3787 and 5375. The equitable rules concerning dealings between guardian and ward are very stringent. The relation is so intimate, the dependence so complete, the influence so great, that any transactions between the parties, through which the guardian obtains a benefit, entered into while the relation exists, are in the highest sense suspicious, and the presumption against them is so strong that it is hardly possible for them to be sustained; and the general doctrine of equity applies after the legal relation is ended, and so long as the dependence on one side and the influence on the other presumptively or in fact continues.—*Daniel v. Tolon (Okla.)*, 157 Pac. 756, 758. It is presumed from the confidential relations between guardian and ward that the ward acts under his guardian's influence, and all transactions between them prejudicially affecting the ward's interests are constructively fraudulent, and this presumption extends to transactions after the guardianship has ended, but the influence remains and the control and dominion of the guardian over the ward's estate continues.—*Daniel v. Tolon (Okla.)*, 157 Pac. 756, 758. Where a transaction between a guardian and ward, at or near the time of emancipation, and while any of the guardianship duties are yet to be performed, is a subject of inquiry, equity casts upon the guardian the burden of showing that the transaction was understood, was fair and reasonable and no advantage taken.—*Williams v. Canary (Okla.)*, 249 Fed. 344, 346. A child, upon attaining majority, becomes clothed with contractual capacity, and a contract between a parent and major child, entered into shortly after the latter's majority can not be said to be *prima facie* void in law, or for that reason to be so doubtful as to impose an affirmative burden of justification, but, if assailed in a court of equity, it will be examined with a searching eye to discover in all the circum-



stances a fraudulent or unconscionable advantage taken, and the fact of proximity to time of majority will be regarded.—*Williams v. Canary* (Okla.), 249 Fed. 344, 345. The funds of the ward constitute a trust fund in the guardian's hands, and, if the guardian use them for his private purposes, they may be followed into the hands of others, and a court of equity will, as far as possible, aid the cestui que trust by indulging every reasonable presumption in his favor, but he must locate the trust fund.—*Korrick v. Robinson* (Ariz.), 180 Pac. 446, 448. When a guardian purchases property of which his wards are heirs the wards can not, fourteen years afterwards, claim for the first time that he held in trust for them, if they have been sui juris long enough for the statute of limitations to operate against the claim, as a claim of fraud; equity will not countenance stale claims.—*Earhart v. Churchill Co.*, 169 Cal. 728, 147 Pac. 942. When the fiduciary relation of guardian and ward or parent and child exists, equity requires the utmost degree of good faith in transactions between the parties.—*Pevehouse v. Adams*, 52 Okla. 495, 153 Pac. 65. A guardian who uses the ward's money to pay his own debts and fails to charge himself with the profits thereby derived, and conceals from the court in probate, that 18 months before applying to the court for leave to borrow the money at 3 per cent he had employed it to pay his own debts at 9 per cent, violates his duty; he is guilty of a fraud and his ward is entitled to relief in equity.—*Smith v. Smith* (Mont.), 224 Fed. 1, 3, 139 C. C. A. 465. The relation of a guardian to his ward and to the court is fiduciary, trust and confidence being reposed in him; he is a trustee and is held to the strict accountability attaching to a trustee.—*Smith v. Smith* (Mont.), 210 Fed. 947, 951. The court has statutory power to authorize a trustee, such as a guardian, to enter into a transaction involving the trust, and in which he has an interest adverse to the beneficiary; but only when the trustee discloses to the court full knowledge of his motives, and of all other facts which might affect the court's decision.—*Smith v. Smith* (Mont.), 210 Fed. 947, 951.

#### REFERENCES.

Relief in equity from orders and decrees of probate and other courts having exclusive jurisdiction over the estates of decedents and of minors and other incompetent persons.—See note 106 Am. St. Rep. 639-647.

#### 17. Liability of guardians.

(1) **For investments made without order of court.**—Where a guardian, in good faith, and for the benefit of the ward, loaned a portion of his ward's funds on mortgage securities taken in his own name, but a portion of the loan was unavoidably lost by depreciation in value of the property, the guardian, if chargeable at all with the part of the principal sum lost by the loan, is not chargeable with any interest thereon, where he is not found guilty of negligence, and no facts are found from which negligence must necessarily be inferred.

—Estate of Cousins, 111 Cal. 441, 450, 44 Pac. 182. If the guardian makes an investment with the exercise of reasonable care, diligence, and business prudence, in the form, manner, and securities approved of by the rules of equity, he will not be liable for losses which may occur through the destruction or subsequent depreciation in value of the property.—Estate of Cousins, 111 Cal. 441, 449, 44 Pac. 182. So where a guardian, at the request of the mother and stepfather of the minor, with whom the ward resided during his minority, purchased certain land for the ward, with the ward's money, and this was done because both the parents and the guardian believed that it was a good investment for the ward, and the investment was made without order or authority of the court, and the title was taken in the name of the guardian, so that the parents of the ward and the guardian might sell the land without an order of the court, and the guardian retained the title for the benefit of the ward, but the ward disaffirmed and refused to ratify the purchase of the land, the guardian is liable only for the sum invested, with simple interest, where there did not appear to have been any intentional or wilful dereliction of duty on the part of the guardian.—Estate of Cousins, 111 Cal. 441, 451, 44 Pac. 182. But when the guardian acts upon his own judgment in making an investment, independently of an order of the court, or otherwise converts the proceeds of the estate to his own use, he takes upon himself responsibilities which the law does not permit, and is held not only to a strict accountability for the money used, but to such actual or punitive damages as may be lawfully imposed for an official neglect of his duty. Hence if he, without authority of court, purchases real estate with the money of his ward, and it appears that the guardian made, or could have made, a profit of ten per cent per annum out of money which he improperly used, and mingled it with his own, the guardian is chargeable with ten per cent interest, compounded annually, because of the rule that he will not be permitted to speculate or make a profit out of the funds in his hands as guardian.—Scheib v. Thompson, 23 Utah 564, 65 Pac. 499, 500. A guardian, who wilfully and unnecessarily mingles the funds of his ward with his own, so as to constitute himself, in appearance, its absolute owner, is liable for its safety in all events; and this rule applies where a guardian lends the funds of his ward, and takes a mortgage and note in his individual name.—In re Bane, 120 Cal. 533, 538, 65 Am. St. Rep. 197, 52 Pac. 852. If a guardian invests a large portion of the ward's estate in loans secured by mortgage upon realty, but such loans are made without the advice and consent of the court, and the security is inadequate, and not such as a prudent business man would take, an order, made at the hearing of the guardian's account rejecting such loans as assets of the estate, will be affirmed.—In re Carver's Estate, 118 Cal. 73, 50 Pac. 22. A guardian is answerable for his act in lending the money of his ward without any security, without even taking any evidence of indebtedness.—Estate of Post, 57 Cal. 273. In an action

by a mother to foreclose a mortgage for \$3000 taken by her to secure a loan made by her of \$2400 of her minor daughter's money, as natural guardian without appointment as legal guardian, it appearing that the mother subsequently pledged the note for the daughter's money and the mortgage to secure a private loan to her of \$1500 by the intervenor, the court properly found and adjudged that since the result of a prior suit by the intervenor to foreclose the mortgage, to which his right was limited, the daughter had acquired both the note of \$2400 of her money and the \$3000 note and mortgage to secure the same, and that she was entitled to foreclose the mortgage, and that the intervenor was entitled to be paid the sum of \$1500 with interest out of the proceeds of sale, and that the remainder of the proceeds should be paid to the daughter.—*Stull v. Benedict*, 10 Cal. App. 619, 102 Pac. 961. A loan by a guardian of the ward's money without strict compliance with the statutory requirements as to such loan is at the guardian's peril.—*American Bonding Co. v. People*, 46 Colo. 460, 104 Pac. 84. Changing form of investment held to require leave.—*Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640; and see *California Code Civ. Proc.*, sections 1768, 1770, 1772.

(2) *Protection of order of court.*—There is no legal obligation or duty resting upon a guardian to give notice to any one, unless directed to do so by the court, of an application by him for an order authorizing him to invest the money of his ward in a particular manner. An order from the court for investment or other management of the ward's funds will protect the guardian, even if misfortune were to follow.—*Estate of Schandoney*, 133 Cal. 387, 390, 65 Pac. 877. If a guardian, in pursuance of an order of court, has invested the money of his ward in a mortgage of real estate, he is not answerable for a loss resulting from the investment, by reason simply of the fact that he failed to foreclose the mortgage. His liability, in such a case, depends upon the question of his negligence.—*Estate of Schandoney*, 133 Cal. 387, 65 Pac. 877. If a guardian, under order of court, sells his ward's property, and pays the proceeds into court, he is not chargeable with the sum so paid in, where it has been lost through official misconduct of the judge.—*Estate of Sniffin*, 3 Haw. 382. A private sale of the land of a minor by his guardian for investment, made under order of court and confirmed by the court though irregular is not void on collateral attack.—*Spade v. Morton*, 28 Okla. 384, 114 Pac. 724. Rendering property subject to mechanic's lien held to require leave of court.—*Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640. Binding property by contract held to require leave, and his attempt to do so will not give the party with whom he contracts any lien for labor or materials.—*Los Angeles County v. Winans*, 13 Cal. App. 234, 109 Pac. 640. The only action of the guardianship court which will protect a guardian in the matter of the investment of the funds of the ward must be action had under such circumstances as show a bringing of such matter by the guardian to the

attention of the court for an adjudication thereon.—*Estate of Wood*, 159 Cal. 466, 36 L. R. A. (N. S.) 252, 114 Pac. 992.

(3) **Liability of guardian. In general.**—The statute does not require annual accounts of a guardian, but it would be better for all concerned if so made. At the same time, we can not say that a failure to comply strictly with the statute, or neglect to render accounts with some regularity and promptness, necessarily imposes punitive responsibility upon the guardian. If there is loss to the estate, the question of the guardian's liability therefor depends much upon the circumstances under which the loss occurred.—*Curtis v. De Voe*, 121 Cal. 468, 53 Pac. 936, 938. A guardian is liable for unauthorized acts done by him after his ward attains majority, as where he proceeds with the foreclosure of a mortgage, and compromises a deficiency judgment. Jurisdiction remains in the probate court, after the minor's majority, over the estate in the hands of the guardian for the purpose of an accounting as to transactions during the minority of the ward, but not as to any occurring after the ward has attained his majority.—*Curtis v. De Voe*, 121 Cal. 468, 53 Pac. 936, 939. A contract with an attorney for professional services is an expense incurred by the guardian in the performance of his duties for which he is primarily liable. Hence no action can be maintained against the minor upon such a contract.—*Hunt v. Maldonado*, 89 Cal. 636, 27 Pac. 56. If a guardian makes a valid contract with an attorney for services to be rendered to the guardian of a minor in pursuance of such contract, and the guardian pays the attorney's fee, and the probate court deems the expenditure reasonable, and necessary to protect the interests of the ward, it may be allowed from the ward's estate. But it is an expense incurred by the guardian in the performance of his duties, for which he is primarily liable. No action can be maintained against the minor therefor.—*Hunt v. Maldonado*, 89 Cal. 636, 637, 27 Pac. 56. A guardian is not liable for the default of his collection agent. Thus a guardian, who, in good faith, and using reasonable care to select a proper agent, does select one of good repute to make collection of a claim of his ward, and such agent collected the money due thereon, and kept it, is not liable to his ward for the loss.—*Beach v. Moser*, 4 Kan. App. 66, 46 Pac. 202. The general rule as to the limit of liability of a trustee for mingling trust funds with his own, and their use in his own business, where it is not shown that a larger profit was realized therefrom, is the return of the principal, with legal interest thereon, compounded annually. This rule is applicable alike to guardians and executors, as well as to other trust relations.—*Estate of Cousins*, 111 Cal. 441, 445, 44 Pac. 182. A guardian's liability upon his own contracts for the benefit of the ward is personal, and the judgment of a court, rendered for such a debt, is against him personally, and not against the ward's estate.—*Sturgis v. Sturgis*, 51 Or. 10, 131 Am. St. Rep. 724, 15 L. R. A. (N. S.) 1034, 93 Pac. 696, 699. Taxes should be assessed to the guardian, not to the ward. The guardian is not liable

for taxes assessed to his ward's estate.—*Brown v. Smith*, 8 Haw. 677, 679. Where, through appointment by a competent court, a person becomes the guardian of a minor, and duly qualifies and takes the oath of office, furnishes a bond and enters upon the discharge of his duties, a trust relation arises between him and the ward, and he becomes responsible and accountable to the ward for all property, money, and effects, or things of value, coming into his control.—*United States F. & G. Co. v. Citizens State Bank*, 36 N. D. 16, 161 N. W. 562. A guardian is answerable, not only for that portion of the ward's estate which has actually come into his hands, but also for such part as he might have recovered by the exercise of ordinary diligence.—*Brewer v. Perryman* (Okla.), 162 Pac. 791. Where a ward lent his money to his guardian, who had it in keeping, the presumption is that the guardian took advantage of his position, and for his own interest influenced the ward.—*In re Anderson*, 97 Wash. 688, 167 Pac. 71. Where a guardian has appropriated his ward's money and used it in his own business adventures he is liable for interest as well as the principal, regardless of whether the ventures have been successful or not.—*In re Anderson*, 97 Wash. 688, 167 Pac. 71. Any conveyance, purchase, sale, contract, and especially gift, by which a guardian derives a benefit at the expense of the former ward, after the termination of the legal relation, but while the influence lasts, is presumed to be invalid and voidable; and the burden rests heavily on the guardian to prove all the circumstances of knowledge, free consent, good faith, and absence of influence, which alone can overcome the presumption.—*Daniel v. Tolon* (Okla.), 157 Pac. 756, 758.

(4) Same. For funds deposited in bank.—Where a guardian deposits funds of his ward in bank instead of investing it in accordance with an order of the court in real estate mortgages, he renders himself liable for a loss of such funds by reason of the failure of the bank of such deposit.—*In re Jiskra's Estate* (Wash.), 182 Pac. 961-962. In the absence of an order of court permitting it, a deposit by the guardian of the funds of his ward in a bank for permanent investment is, in effect, a loan to the bank on personal security only, which is not a proper exercise of due care. In such case, the guardian is liable to make good the loss of such permanent investment as the result of the failure of the bank.—*Estate of Wood*, 159 Cal. 466, 36 L. R. A. (N. S.) 252, 114 Pac. 992. The necessity of temporarily depositing trust funds in a bank for safe-keeping is recognized, and if a trustee, for the purposes of such temporary deposit, exercises the degree of care and skill stated in the selection of a bank, and so earmarks the deposit as to show its trust character, he is not responsible for the failure of the bank; but if he deposits the money in his individual real name, without any designation or indication of his representative character, he is generally liable in the event of loss through the failure of the bank, notwithstanding he has not been guilty of any negligence.—*Estate of Wood*, 159 Cal. 466, 36 L. R. A. (N. S.) 252, 114 Pac. 992.

When a guardian in good faith and under the order of the probate court deposits funds belonging to his ward in a bank outside the territory of Alaska and such fund is lost by the failure of the bank during a financial stringency, the guardian is not liable for the loss.—*In re Guardianship of Corcoran*, 3 Alaska 263. While a guardian is permitted to leave the funds of his ward temporarily on deposit in a reputable bank, pending investment or other disposition of the same, it is the decided weight of authority that he is personally chargeable with the loss of funds deposited with a bank for a fixed period of time upon a certificate of deposit. Such a deposit is a loan without security.—*Corcoran v. Kostrometinoff*, 164 Fed. 685, 687, 91 C. C. A. 619. Where interest income of funds of his ward was ordered to be deposited in a specified bank by the guardian, the latter was justified in the assumption that the court had concluded from the evidence that the bank was a safe one in which such funds might be deposited, and he, therefore, was further justified in assuming that other funds arising from the same source might be also safely deposited in the same bank, and it was not necessary to obtain special orders of court for that purpose, but was justified in assuming that the original order was a continuing one.—*In re Jiskra's Estate* (Wash.), 182 Pac. 959-960. A testamentary guardian, when receiving a trust fund, in the shape of a deposit in, or loan to a bank, may not rest on having no reason to doubt the solvency of the institution, and so leaves the investment, for a brief period, as he found it; his business is to acquaint himself with conditions.—*Mumford v. Rood*, 36 S. D. 80, 89, 153 N. W. 921.

(5) *Validity of acts of guardian*.—Where the records of the county court show that letters of guardianship were duly issued and recorded, that the guardian duly qualified, gave bond, and entered upon the discharge of his duties as such guardian, as required by law, his acts will be held valid, although the record may fail to disclose any other evidence of his appointment.—*Hathaway v. Hoffman*, 53 Okla. 72, 153 Pac. 184, 186. A deed made to one who formally occupied the relation of guardian of the grantor, though voidable as to the latter, or those in privity with him, can not be avoided by a stranger, whose attempt to establish title in himself from the common grantor has failed.—*Akin v. Bonfils*, 50 Okla. 555, 150 Pac. 194.

#### REFERENCES.

Guardian carrying on business of ward.—See note 40 L. R. A. (N. S.) 205. Personal liability of a guardian for losses to ward's estate from investments.—See note 44 L. R. A. (N. S.) 873.

18. *Embezzlement by guardian*.—It is not necessary, in an indictment against a guardian for embezzlement, to allege the particulars of the guardianship; such as the date of defendant's appointment as guardian, and in what court appointed, as well as the issue of letters of guardianship to him, and the fact of his taking possession of

certain moneys of his ward; the fact of his filing his account, and a settlement thereof; the fact that he was incapable of discharging his trust or was unsuitable therefor; or had wasted or mismanaged the estate; and that the court, upon due notice given, had removed him, and had demanded that he should surrender the estate of his ward to the person found to be legally entitled thereto. It is sufficient to meet the requirements of the statute, to allege, after stating the jurisdictional facts, that, at a designated date, the defendant, "being then and there intrusted with and having in his control" a certain sum of money, "as guardian, trustee, and agent" of the person named, and "for the use and benefit" of said person, and being his "property," did, at a time and place named, "willfully, feloniously, and fraudulently embezzle, convert, and appropriate the same to his own use."—*People v. Page*, 116 Cal. 386, 391, 48 Pac. 326. Where a guardian of two minor wards converts to his own use a fund, a respective half of which belonged to each of the wards in severalty, each of them acquires a separate claim against the guardian for his portion of the fund so converted.—*Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. Where the evidence shows that the wards had received more than the amount due them from the estate it was held that a charge against the guardian and others of conspiracy to defraud was not maintained.—*Smith v. Kent Lumber Co.*, 78 Wash. 278, 138 Pac. 879. An action may be maintained in the district court against the administrator of a guardian who converted his ward's money, became insolvent and died, and against the sureties on the guardian's bond, without a previous settlement of the guardian's accounts in the probate court.—*Mitchell v. Kelly*, 82 Kan. 1, 107 Pac. 782, 136 Am. St. Rep. 97. Where guardian was appointed when wards were only twelve and fourteen years of age, year after received \$4000 for wards, which he never accounted for, and suit was instituted over forty-four years after, shortly after discovery of conversion, it was held that the lapse of time was no defense to the action.—*Miller v. Ash*, 156 Cal. 544, 105 Pac. 600. Where a person has been duly appointed, by a competent court, guardian of a minor and his estate, and has taken the appropriate oath, filed the proper bond and done the other things made by law essential to his acting under the appointment, but embezzles the ward's money, or otherwise defaults to the ward's financial injury, and the surety on his bond makes good the default, the surety is subrogated to the rights of the ward as against the guardian or any body else involved in the fraud.—*United States F. & G. Co. v. Citizens State Bank*, 36 N. D. 16, 25, 161 N. W. 562. What "borrowing," by guardian, of his ward's funds, in the guardian's hands, is not embezzlement.—*Smith v. Smith*, 45 Mont. 535, 581, 125 Pac. 987.

19. Resignation of guardian.—Under the provisions of section 1801, Code Civ. Proc., of California, the court is given complete discretion to accept a guardian's resignation and to appoint a successor, and those provisions are not limited by those of section 1427, Code Civ.

Proc., made applicable generally to guardian and ward by section 1808 of the same code.—*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 599, 157 Pac. 1127. The word "suspended" in section 159 Civil Code of California clearly means "terminated," but the court which appoints a guardian has inherent power to terminate such appointment without any statute.—*State (ex rel. South Dak. C. H. Soc.) v. Kelley*, 32 S. D. 526, 143 N. W. 953. The power of the court to accept the resignation of a guardian and to confer full powers of guardianship upon a successor is not dependent upon the previous accounting for and delivery by the former guardian to a third person of the estate of his ward.—*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 599, 157 Pac. 1127. Where a succeeding guardian is appointed following the resignation of the former guardian, the order of appointment of the new guardian operates as an acceptance of the resignation of the former one, and it will be presumed that the property of the ward was delivered up at the time the order was made.—*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 598, 157 Pac. 1127. The resignation as the guardian of a minor child of its mother takes effect on the day on which the order appointing his or her successor is signed by the court, and an order accepting the mother's resignation, approving her accounts, and discharging her as guardian, notwithstanding the order was not filed until the following day, and a judgment quieting title brought by the mother against her child is not void on its face, because the record shows that the summons in the petition to quiet title was served on the new guardian on the day of his appointment and before the filing of the order appointing him.—*Fresno Estate Co. v. Fiske*, 172 Cal. 583, 597, 157 Pac. 1127.

20. Removal of guardian.—If the guardian of a ward is an unsuitable person, he should be removed. Thus a father, who, as guardian of his minor children, is in receipt of an annual income of two thousand dollars from their property, and who persistently refuses, through a period of several years, to provide for their support and education, is not a suitable person to have the management of their estate, and should be removed from his guardianship.—*Guardianship of the Swifts*, 47 Cal. 629, 631. The court has jurisdiction, in a proceeding to compel a guardian to account, to remove him for his failure to account, after being cited to do so.—*Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360, 361. The order of removal, however, must be upon one of the grounds specified in the statute, or such order will be reversed on appeal.—*In re Raynor*, 74 Cal. 421, 16 Pac. 229. And it is error to revoke letters of guardianship without notice to the guardian, or giving him an opportunity to be heard.—*Estate of Rose*, 66 Cal. 241, 5 Pac. 220. The record must show that the removal was based on statutory grounds. If no cause for removal appears in the record on appeal, the court can not assume that the guardian was removed upon a cause not appearing in it.—*In re Raynor*, 74 Cal. 421, 16 Pac. 229. It is error to remove the guardian where



the petition for his removal presents no fact showing that the guardian has become incapable of discharging his trust concerning the estate of his ward, or that he is unsuitable therefor, or that he has wasted or mismanaged the same, or that he has failed to render an account or to make a return.—*Estate of Rose*, 66 Cal. 240, 5 Pac. 219. If the guardian of an estate is removed by the probate court, and another guardian is appointed in his place, and an appeal is taken by the guardian removed, the newly appointed guardian is a necessary party.—*Estate of Medbury*, 48 Cal. 83. Before appointing a guardian, it is mandatory that the person having the custody of the minor should have notice of the hearing. Such notice is absolutely necessary to give the court jurisdiction of the proceeding, and power to make the order of appointment. But where the record does not disclose anything showing that the order of appointment was void, or beyond the jurisdiction of the court, a court will not, after the expiration of six months from the issuance of letters of guardianship, direct such letters to be set aside for want of notice, where such application is made under a statute providing that all applications to set aside orders or judgments not void upon their face must be made within six months after the entry of such order or judgment.—*In re Elckerkotter's Estate*, 126 Cal. 54, 58 Pac. 370. Judgment removing a guardian is conclusive, not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian, equally binds and concludes his sureties.—*Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360, 361. A probate judge at chambers has power to discharge a guardian.—*Warder v. Elkins*, 38 Cal. 439, 441. If a guardian has been cited to appear and render an account, but neglects and refuses to do so, the court is authorized to remove him for his failure to account.—*Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360, 361. The act of a probate court in removing a former guardian and appointing his successor must be presumed to have been correct.—*Brodrib v. Tibbits*, 63 Cal. 80. A guardian is not a "public officer" within Gen. Stats. 1009, sec. 3624, subd. 9, of Oklahoma, providing that quo warranto may be brought in the supreme court when any person shall unlawfully hold any public office; and hence the supreme court has no jurisdiction to entertain an action in quo warranto to oust a guardian.—*Linderholm v. Ekblad*, 92 Kan. 9, 139 Pac. 1015. If the guardian of an infant is removed for his failure to account to the county court for money due the infant, and no guardian is appointed to succeed the one removed, an action upon the bond, for the benefit of the infant, may be brought by a next friend.—*First State Bank v. Fay* (Okla.), 159 Pac. 505. Without regard to whether the guardian of an infant is or is not his father or mother, such infant may, on reaching the age of 14, displace him in favor of some other person of his own selection.—*Estate of Melklejohn*, 171 Cal. 247, 152 Pac. 734. When a guardian has been removed for misappropriating the ward's

property, and his successor has brought suit against him and his sureties to recover the amount in default, it can not be set up by way of defense that the court was without jurisdiction to appoint a guardian.—*Aetna Acc. & L. Co. v. Langley* (Okla.), 174 Pac. 1046. The removal of a guardian for cause under the statutes, and the appointment of a successor, rest largely in the discretion of the county court, and in the absence of an abuse of such discretion, the action of that court will not be disturbed.—*In re Guardianship of Chambers*, 46 Okla. 139, 144, 148 Pac. 148. Where the guardian of the estate of a minor is properly appointed in the first place, the court acquires jurisdiction to administer its estate, and may, under the statute, appoint a successor to such guardian upon the latter's removal, without notice.—*In re Guardianship of Chambers*, 46 Okla. 139, 143, 148 Pac. 148. The provisions of section 148 of the Civil Code of the state of South Dakota (Comp. Laws of 1913, § 2641), give to a court appointing a guardian exclusive jurisdiction over him, and the power of such a guardian can not be terminated by the order of any other court, so that a guardian appointed by the circuit court can not be removed by the county court.—*State (ex rel. South Dak. C. H. Soc.) v. Kelley*, 32 S. D. 526, 143 N. W. 953. If a guardian mingles guardianship funds with his own, or profits by the use of the ward's funds, he should be summarily removed.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661. Where the guardian of the estate of a minor appears in person and by counsel, before the court of probate to explain certain features of his reports, pursuant to an order of the court so to do, and admits, under oath, that he has wasted, mismanaged, and dissipated his ward's estate, and is short in his accounts as guardian, under the statute the court has authority to remove said guardian without further notice.—*In re Guardianship of Chambers*, 46 Okla. 139, 142, 148 Pac. 148.

#### 21. Rights and liabilities of ward.

(1) *In general*.—After wards reach majority, they may disaffirm the acts of their guardian, but they are not absolutely obliged to reject what their guardians have done; they have an election, and if, within a reasonable time, they do not disaffirm such acts, they thereby become affirmed, and the wards are bound thereby.—*Brazee v. Schofield*, 2 Wash. Ter. 209, 3 Pac. 265, 268. If a new guardian gives a note for money borrowed for the support and maintenance of the ward by a previous guardian, such note can not bind the ward, where it has not been approved by the court having jurisdiction of the estate, and if no consideration for the note was ever received by the new guardian, he can not be held personally liable therefor.—*Wright v. Byrne*, 129 Cal. 614, 62 Pac. 176. Although a final settlement is made by an administrator or guardian, the owner of the land and beneficiary of the trust will ordinarily not be estopped from asserting a title to the land wrongfully obtained by the trustee, unless the beneficiary had full knowledge of the wrong practiced by the trustee, and of

the facts upon which the rights of the beneficiary are founded.—*Webb v. Branner*, 59 Kan. 190, 52 Pac. 429, 431. Nor can the fact that the trustee made improvements on the land wrongfully obtained by him during the infancy of the beneficiary, and with the beneficiary's knowledge, prevent such beneficiary from claiming the land after attaining majority.—*Webb v. Branner*, 59 Kan. 190, 52 Pac. 429, 432. For facts under which it was held that a ward was not entitled to foreclose against the guardian's vendee a mortgage executed to him by his guardian, where there had never been any settlement of guardianship accounts, and it had never been determined whether the guardian was indebted to his ward, or whether, on the other hand, the ward's estate was liable to him, see *Cummings v. Strobridge L. Syndicate*, 150 Cal. 209, 119 Am. St. Rep. 189, 88 Pac. 901, 902. In an action to terminate a trust, minor defendants are not bound by admissions of their guardian to their prejudice.—*Kidwell v. Ketler*, 146 Cal. 12, 79 Pac. 514. If a guardian, in payment of his own debt, executes and delivers a receipt in satisfaction of obligations due his ward, the obligor, if he has notice, takes at his peril, and the ward may recover from him upon such obligations.—*Williams v. Francis* (Okla.), 166 Pac. 699. If a guardian without the authority of the county court, purchases real estate for his ward, the transaction being free from fraud, and causes a deed to be made to his ward therefor, the title to said property passes to the ward, and a petition filed by a subsequent guardian against the vendor in said deed to recover the purchase price paid for the same, upon the sole ground that the conveyance to the ward passed no title because the order of the court was made by a judge related to the then guardian within the prohibited degree provided by statute, fails to state a cause of action, and it is proper to sustain a demurrer thereto.—*Berryhill v. Jackson* (Okla.), 172 Pac. 787. Though an attempt to obtain the revocation of an order of guardianship is unsuccessful, counsel fees may be awarded to counsel who represented the ward, where the application was made in good faith.—*Magoon v. Fitch*, 16 Haw. 13, 15.

#### REFERENCES.

Disqualification to sit in guardianship proceedings. See note post, on disqualification of judge and transfer of proceedings, following table after § 342.

(2) Actions by ward. In general.—Before a ward can proceed against a guardian, or sureties, whether he has become of age or not, there must first have been an accounting had in the county court, and a liability on the part of the guardian found.—*Gronna v. Goldammer*, 26 N. D. 122, 132, 143 N. W. 122. Where the father of children died, leaving personal property in the state of Oregon and land in the state of Washington; where a guardian was appointed for the personal estate in Oregon; and where the guardian fraudulently purchased from the children, at an inadequate price, the Washington land, equity has

no jurisdiction of an action brought by the children for the difference between the price received and the value of the land; it is necessary in such a case that the plaintiffs either affirm the transaction and sue for damages; or, repudiate the bargain and call upon equity to place them in statu quo; both remedies can not be had in one action.—*Marshall v. Gustin* (Okla.), 170 Pac. 312.

(3) *Same. Against purchaser.*—In an action by a ward against the purchasers for the value of his land sold by his guardian in exchange for other property, under circumstances amounting to constructive fraud, the measure of damages is the value of the property at the time of exchange, less any money received as boot at the time, with interest from said time, and less rents and profits received from the real estate exchanged, above necessary repairs and expenses, and remaining in the hands of the ward at the time he reached his majority, or at the time he seeks to avoid such exchange during his minority.—*Perkins v. Middleton* (Okla.), 166 Pac. 1104, 1108.

(4) *Same. For fraud.*—The rule requiring strong proof of a fraud in the impeachment of a written instrument, as against the defendant, does not apply in a suit against a guardian by a ward, on the latter's reaching full age, to set aside and vacate an order approving the guardian's final account.—*Francis v. Sperry* (Okla.), 176 Pac. 732, 734. A person who, on becoming of full age, sues the sureties of the guardian of his minority, to recover for alleged defalcation by such guardian, has the burden of establishing the defalcations.—*Morgan v. American Surety Co.*, 103 Kan. 491, 175 Pac. 675. Where a corporation leases a minor's land from her guardian, for oil and gas purposes, paying therefor to the guardian for the use of his ward, \$40 an acre bonus and an eighth royalty, and at the same time and as a part of the same consideration, pays to the guardian for his own use and benefit, \$20 an acre for the improvements on the land, claimed by the guardian to be his property, when in fact such improvements were purchased with the money belonging to the ward, the ward may maintain an action against such corporation for a cancellation of the lease. But where such action is commenced by the ward after majority, and she sets out in her petition all of the facts relative to the fraudulent transaction between the corporation and her guardian, and verifies the same, and when such ward is a person of ordinary intelligence, if thereafter she voluntarily makes final settlement with her guardian, receiving from him valuable property and money, knowing said property and money to be the proceeds of such lease, such settlement is a ratification of the lease.—*Lasoya Oil Co. v. Zulkey*, 40 Okla. 690, 140 Pac. 160. Where the guardian fraudulently disposes of the ward's property, so that the ward suffers financial loss, the ward can hold responsible not only him, but all other persons who, having knowledge of the trust relations, have secured to themselves any of such property against the interests of the ward.—*United States F. & G. Co. v. Citizens State Bank*, 36 N. D. 16, 25, 161 N. W. 562. A purchaser at a guardian's sale

who diverts the price to the payment of a personal debt of the guardian exposes himself to a suit by the ward to recover such price, while the property is subject to a vendor's lien.—*Harris v. Wilcox* (Okla.), 175 Pac. 353.

(5) *Same.* For misuse of his money.—A ward who on reaching full age sues his guardian for using plaintiff's money as his own, and not as trust funds, is entitled, on recovering judgment, to interest equal to the highest rate that might have been procured legally, had the money been lent for the plaintiff's benefit.—*Francis v. Sperry* (Okla.), 176 Pac. 732. An infant's guardian who continues to act after the ward's attaining maturity, and accepts compensation for the service, is estopped to deny guardianship in a suit by the ward for using the latter's money as though his own.—*Francis v. Sperry* (Okla.), 176 Pac. 732, 735.

(6) *Same.* To recover moneys.—If a ward falls for over ten years to bring suit against his guardian to recover moneys received by him, which suit he might have brought, and there is no proof to show non-payment, the inference is that payment was made.—*Love v. Love*, 72 Kan. 658, 83 Pac. 201. A ward can not maintain a suit against his guardian for a supposed balance until after an account and settlement is had in the probate court.—*Allen v. Tiffany*, 53 Cal. 16. If the probate court enters an order or decree settling a guardian's account, the ward's action against the sureties on the guardian's bond is premature, where such action is commenced before the expiration of the time allowed by law for the taking of an appeal from such order.—*Cook v. Ceas*, 143 Cal. 221, 223, 77 Pac. 65. If a guardian deposits some of his own money, and some of the money of his wards, with a person who sustains toward such guardian a relation of personal confidence, and the guardian afterwards gives to such depositary a receipt in full of the moneys of the wards, and release of all demands, the depositary can not rely upon such receipt and release as an estoppel against the wards, without pleading such estoppel, where the wards bring an action to recover the moneys so deposited. And where it appears that the settlement was not fair, that the signature of the guardian was procured through mistake, misrepresentation, and fraud, and that there was a large amount of the minor's money still in the depositary's possession, the wards have a right to go behind the settlement, and show the facts. They have their election to pursue either the guardian, his sureties, or the person with whom the settlement was made; and this is their right, independently of any statute requiring a guardian to obtain the consent of the court to such a settlement.—*Montgomery v. Rauer*, 125 Cal. 227, 57 Pac. 894. If a depositary receives money belonging to minors, from their guardian, with whom he has a relation of personal confidence and trust, and with knowledge of the origin and character as to the trust funds of the minors, he becomes a trustee of the minors in relation to such moneys, and can not justify his retention of the money upon the ground that he has applied it to

a personal debt due to him from the guardian.—*Montgomery v. Rauer*, 125 Cal. 227, 57 Pac. 894, 896. An action for a balance claimed to be due from a guardian to his ward at the time the latter reached the age of majority is not an action for relief on the ground of fraud.—*Hawk v. United States F. & G. Co.*, 83 Kan. 775, 112 Pac. 602.

(7) *Same. Against estate of deceased guardian.*—In an action by a ward against the executors of a deceased guardian's estate to recover a balance claimed to be due to the plaintiff, the executors can not urge the statute of limitations, where the testator's will contained a clause waiving and repudiating the statute of limitations and directly directing his executors to pay all obligations, notwithstanding such statute, as this waiver is a part of the testamentary disposition of his property which he had the right to make, and which his executors should enforce.—*Glassell v. Glassell*, 147 Cal. 510, 512, 82 Pac. 42. In an action by a ward to recover money alleged to be due from the deceased as guardian of the person and estate of the plaintiff, the allowance of compound interest is not erroneous, although no fraud is charged or found against the estate touching his conduct as guardian, where the evidence was that such guardian commingled the funds of his ward with his own, and that the deceased never filed an inventory or appraisal, and never rendered any account in the matter of such guardianship, and never kept any account upon his books from which a proper accounting could be rendered to the court; and where it further appears that he never obtained any order from the court authorizing him to use any of the funds of the plaintiff.—*Glassell v. Glassell*, 147 Cal. 510, 512, 82 Pac. 42. In Oklahoma, the district court has jurisdiction of an action instituted by a ward against the estate of his former guardian and the surety upon the latter's bond, although the guardian had not made an accounting and settlement of his affairs as such guardian with the county court prior to his death.—*Morey v. Christian* (Okla.), 169 Pac. 887. The word "claim," as used in the statute of Washington, includes the right of a ward, after he reaches majority, to recover against the estate of his deceased guardian for a devastavit.—*Newberry v. Wilkinson* (Wash.), 199 Fed. 673, 682, 118 C. C. A. 111.

#### REFERENCES.

Interested witness, or party to suit involving ward's estate or rights, guardian, or next friend as.—See note 4 *Am. & Eng. Ann. Cas.* 1068. Suit on claim of lunatic, where guardian and administrator, happen to be the same person.—See note, post, subd. 5, on claims against estates, following § 481.

(8) *Actions against ward.*—It is settled law of California that an action will not lie against a minor or his estate for the value of services rendered to the guardian of such minor to assist him in the execution of his trust. The possession of a guardian, in this respect, is the same as that of the administrator of the estate of a deceased person; both the administrator and the guardian are primarily liable

to those whom they employ to aid them in the care, management, and protection of the estate; and the question of reimbursement of the administrator or guardian from the estate, for such necessary expenses as he may incur, is one solely between the administrator or guardian and the estate which he represents, and one which the court having jurisdiction of the estate has the sole power to determine. The person rendering services to the administrator or guardian can not maintain an action for the value thereof against the estate or against the ward.—*McKee v. Hunt*, 142 Cal. 526, 77 Pac. 1103. And an order made on the application of a guardian for the substitution of a new attorney for the guardian does not authorize a contract affecting the property of the estate of the minor, nor require the performance of any legal services, and there is no provision of law authorizing the court having jurisdiction of the guardianship proceedings to require or direct an attorney to perform legal services for the guardian.—*McKee v. Hunt*, 142 Cal. 526, 77, Pac. 1103, 1104. The personal or real estate of the ward can be converted into cash only by proceedings under the direction of the county court. This is the policy of our whole probate law with reference to estates of deceased persons, as well as to those under guardianship. Therefore the enforcement of a judgment against the ward can be accomplished only through the county court, and not by process, either against the ward's estate or the guardian.—*Sturgis v. Sturgis*, 51 Or. 10, 131 Am. St. Rep. 724, 15 L. R. A. (N. S.) 1034, 93 Pac. 696, 699. The judge of the court may order a guardian to pay counsel fees to his ward's wife to enable her to defend in proceedings brought to deprive her of the custody of her infant.—*Guardianship of McGrew*, 9 Haw. 426, 427. There is no abuse of discretion in appointing a guardian ad litem, and permitting him to file an answer after the evidence is introduced, and before the case is finally decided.—*Earl v. Cotton*, 78 Kan. 504, 96 Pac. 348. Service of summons upon a guardian confers jurisdiction to enter judgment against the estate of his ward.—*United States F. & G. Co. v. Howell*, 74 Wash. 596, 599, 134 Pac. 490. It is not required that a claim against a ward be presented to a guardian; it is proper to bring action against the ward directly, and then he must appear by guardian.—*The Home v. Selling*, 91 Or. 428, 179 Pac. 261. Where a judgment was taken in a suit in which it had been found necessary to make a person, who was a minor, a party defendant, service of process upon whom was possible only by publication, such judgment will not be set aside because of a defective affidavit for publication if the trial judge was satisfied, as appears by the decision in the cause, that the statements in such affidavit had a legal tendency to show an exercise of diligence on the plaintiff's part in seeking to find such person within the state, and that after the exercise of such diligence he could not be found; unless it is claimed that the minor had a regularly appointed guardian, who was living at the time, and that such guardian had not been sought for service.—*Clarkin v. Morris*, 178 Cal. 102, 172 Pac. 981. Where a firm of attor-

neys is employed by the acting guardian of the estate of minor heirs to perform legal services and such employment is ordered and sanctioned by the probate court and it appears that such services were necessary and beneficial to the estate, and that the charges therefor were reasonable and just and where the judgment for the amount claimed is sufficiently supported by the evidence, such judgment will not be disturbed.—*Parnell v. Wadlington*, 42 Okla. 363, 139 Pac. 121.

#### REFERENCES.

Interested witness, or party to suit involving ward's estate or rights, guardian or next friend as.—See note 4 Am. & Eng. Ann. Cas. 1068.

(9) No disaffirmance of parol partition when.—A parol partition, carried out and followed by actual possession in severalty of the several parcels is valid, and will be enforced, notwithstanding the statute of frauds, on the theory that it has been removed from its operation by part performance. Hence, if co-heirs, upon reaching majority, and knowing the circumstances of such partition, retain possession of the land theretofore set apart to them by such partition, claim it as their own, asserting no claim whatever to the other land occupied by the persons who have been their co-tenants, enjoying the fruits thereof, and exercising dominion over the same, such oral partition is binding upon them. They can not be heard in disaffirmance of the partition. They are conclusively presumed to have ratified the partition; and the rights of the various parties to the partition, and their title to the land, would relate back and attach as of the date of the partition.—*White-more v. Cope*, 11 Utah 344, 40 Pac. 256, 258.

#### 22. Bond of guardian, and liability thereon.

(1) Failure to give a bond.—In California, a person can not become guardian of the property of minor children, though appointed by the court as such, until he gives the bond required by statute.—*Murphy v. Superior Court*, 84 Cal. 592, 24 Pac. 310. But he is not estopped to deny the fact of guardianship by reason of his neglect to give the bond required by law, where he has received no property belonging to the minors, as their guardian, or by virtue of his appointment.—*Murphy v. Superior Court*, 84 Cal. 592, 597, 24 Pac. 310. The validity of guardianship proceedings must be upheld on a collateral attack, though there was a failure to require a bond on the appointment of the guardian, such failure being merely an error, and not in excess of jurisdiction in such proceedings.—*In re Chin Mee Ho*, 140 Cal. 263, 73 Pac. 1002, 1003. In Kansas, the appointment of a guardian, who duly takes the oath required, and receives letters of guardianship in due form, issued by the probate court, is not rendered absolutely void by his failure to give the bond required by statute.—*Hunt v. Insley*, 56 Kan. 213, 42 Pac. 709. The failure of a guardian to give a bond as the statute provides, is a jurisdictional defect, and a sale of real estate in a guardianship proceeding where no bond has been given is illegal and



void.—*Vanhorn v. Nestoss*, 99 Wash. 328, 334, 169 Pac. 807. The failure of a guardian to give the bond required by statute goes to the jurisdiction of the court to order a sale of real estate and is not a mere irregularity which may be cured under the provisions of section 1693, Rem. Code of Washington.—*Vanhorn v. Nestoss*, 99 Wash. 328, 334, 169 Pac. 807.

#### REFERENCES.

A corporation may become surety on a guardian's bond.—See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1056. Concerning bond on appointment, see subd. 1 (5), ante.

(2) *Purpose of bond.*—A guardian's bond, executed as security only for the proper use of the personal estate of the ward, and the rents and profits of his real estate, under one section of the statute, is not intended as a security for the proper use of the purchase-money received by the guardian on the sale of the ward's real estate, under another section of the statute, as a separate bond is required for that purpose.—*Morris v. Cooper*, 35 Kan. 156, 10 Pac. 588. The general bond required of a guardian is intended to secure to the infant the proper accounting for all funds, from whatever source they may be derived, that may come into the hands of the guardian; the special or "sales" bond required by statute is cumulative security required and given for the benefit of the ward, and a failure on the part of the guardian to account for the proceeds of a sale of real estate will not excuse or absolve his sureties on his original or general guardian's bond.—*Southern Surety Co. v. Burney*, 34 Okla. 552, 43 L. R. A. (N. S.) 308, 126 Pac. 748. Where a guardian's bond runs to several wards jointly they are not all necessary parties plaintiff, the bond being to protect the individual rights of each ward and the determination of the controversy will not prejudice the rights of the other wards, but if necessary the court may order them to be brought in.—*United States F. & G. Co. v. Parker*, 20 Wyo. 29, 121 Pac. 536. Although not always named as obligee in the bond, the security is for the benefit of the minor, the person non compos, or heirs, devisees, legatees, and creditors of the estate of the decedent, as the case may be, and it becomes theirs as much as if given directly to them.—*Aetna Accident & Liability Co., v. Langley* (Okla.), 174 Pac. 1046. In view of the code provision making the provisions relating to executors and administrators applicable to guardians, the giving of a bond is a condition precedent to the appointment as a guardian.—*Vanhorn v. Nestoss*, 99 Wash. 328, 331, 169 Pac. 807. Where the caption of a guardian's bond showed that it ran to "Redfield P. Richard, et al., minors," as obligees, and in various particulars referred to the guardianship cause, and the order appointing the guardian, which order named Parthenia A. Richard, as one of the minors, and required the guardian to make the bond for the latter's benefit, it is held that the said Parthenia A. Richard was an obligee of the bond though her name did not appear in its

caption.—*Southwestern Surety Ins. Co. v. Richard* (Okla.), 162 Pac. 468, 471.

(3) **Breach of bond and control over K.**—The probate court has no authority to entertain an application by the creditor of a guardian of minor children for the allowance, against the estate of the wards, of a judgment of the district court rendered against the guardian on a contract made by him in carrying on a general merchandise business with the ward's money, nor to order the payment of such a judgment, for such a proceeding, and the violation of such an order does not constitute a breach of the guardian's official bond.—*Harter v. Miller*, 67 Kan. 468, 73 Pac. 74. When a ward attains the age of majority, the office of guardian comes to an end, and it is then the duty of the guardian, and one of the obligations of his bond, to exhibit a final account of his guardianship to the probate court, make a settlement with the probate judge or with the ward, and deliver all the property in his hands belonging to the ward. Failure to do this constitutes a breach of his bond, for which he and his sureties are liable after settlement of the guardianship.—*In re Allgier*, 65 Cal. 228, 229, 3 Pac. 849. The county court is merely the instrument by which the bond is obtained, and its power over the bond, thereupon and on the approval of the bond, ceases, except such as may be expressly conferred by statute.—*Aetna Accident & Liability Co. v. Langley* (Okla.), 174 Pac. 1046, 1048.

(4) **New bond.**—A probate court has power to take a new bond from the guardian of a minor's estate in place of a former bond. When this is done, the new bond is given as a substitute for the old one, and the legal effect of it is, that the sureties on the old bond are not answerable for any defaults of the guardian occurring after the filing of such substituted bond.—*Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679, 681.

(5) **Action on bond. In general.**—The sureties on a guardian's bond may be sued without first recovering judgment against the guardian, and without making him a party.—*Gebhard v. Smith*, 1 Colo. App. 342, 29 Pac. 303, 305. A suit on a guardian's bond can not be commenced, however, before there is any breach of the bond. It is not the bond that constitutes the cause of action, but some breach of the bond; and if a guardian is not in default until he fails, or refuses on demand, to pay over the amount found due on settlement of his accounts, then a final order of settlement is an essential element of the cause of action against his sureties.—*Cook v. Ceas*, 143 Cal. 221, 226, 77 Pac. 65. A minor by his legal guardian may maintain an action on the official bond of a former guardian, although the bond, which was executed prior to statehood, was made payable to the United States of America.—*Title Guaranty & Surety Co. v. Slinker*, 35 Okla. 128, 128 Pac. 696. While it is the duty of a succeeding guardian to protect the interests of his wards by action on the bond

of his predecessor, yet the right of action is in the minors themselves, and the fact that they have a guardian who must bring the suit in their names, and who is liable for any loss resulting from his neglect to do so, does not cause the statute of limitations to run against them during their minority.—*Title G. & S. Co. v. Cowan* (Okla.), 177 Pac. 563, 566. Under the statutes of this state "the person entitled to bring action" on a guardian's bond, is not the successor to the principal on such bond, but the ward.—*Title G. & S. Co. v. Cowan* (Okla.), 177 Pac. 563, 565. A person who asserts that a guardian has defaulted on his bond has the burden of proof.—*Morgan v. American Surety Co.*, 103 Kan. 491, 175 Pac. 675. If the guardian of a minor allottee of the Five Civilized Tribes makes a contract, outside the scope of his authority as guardian and not in conformity with the law governing his acts as guardian, affecting his ward's lands or the proceeds therefrom, and the ward, upon reaching the age of majority, disaffirms the contract, he may recover on his guardian's bond.—*Southern Surety Co. v. Lephew* (Okla.), 173 Pac. 438. A joint action may be maintained on a guardian's bond by or on behalf of two wards for an accounting and settlement, where they have a joint interest in the fund or property for which the guardian has failed to account.—*Donnell v. Dansby*, 58 Okla. 165, 159 Pac. 317.

(6) Same. Pleading. Evidence. Jurisdiction.—Where the condition of the obligation of a guardian's bond is in the language of the statute, and is to the effect that he shall faithfully discharge the office and trust of such guardian according to law, etc., he is bound to discharge faithfully the obligation imposed upon him by the statute, regardless of any orders, or any demands for an accounting, or any proceedings by the heirs or their representatives against him; and it is sufficient for the complaint to allege that, after entering upon the duties of such guardian, he filed an inventory, and subsequently filed an account; that he did not faithfully discharge the office and trust of such guardian according to law; that he did not render fair and just accounts of his guardianship; that he failed to account for the rent of real property belonging to the estate; that he failed to take proper care of said property; and that he failed to obtain sufficient rent for the same for a designated period.—*Gebhard v. Smith*, 1 Colo. App. 342, 29 Pac. 303, 305. Where a guardian's bond is made payable to the people of the state a suit thereon is properly brought in the name of the people to their use.—*McDonald v. People*, 12 Colo. App. 98, 54 Pac. 863. The only orders of the court which can be evidence against the sureties in a suit on a guardian's bond are orders made upon the guardian personally, in relation to his guardianship accounts, or in relation to the property of his wards in his possession; and such orders must be made in the guardianship proceeding. However regular an order may be, if it is not an order contemplated by the bond, or in relation to which the sureties entered into an undertaking, it is not evidence against them, but is utterly

incompetent and inadmissible.—*McDonald v. People*, 12 Colo. App. 863, 54 Pac. 863, 864. In an action against the administrator of a deceased guardian and his sureties, a complaint alleging that there came into the possession and control of the deceased guardian a specified sum, which, at the time of his death, he held and retained, and mingled the same with his own funds, and appropriated it to his own use, and that he had refused and neglected to account for the same to plaintiff at the time of his death, states a cause of action, though it does not aver non-payment; and the judgment is sufficient, where it shows a settlement of the account as against the administrator. Where there is an administrator of the deceased guardian, the account must be settled and allowed as a basis for the liability of the surety. The status of the account must be fixed and determined. It is not necessary that there should be a separate suit in equity to settle and determine the liability of a deceased guardian, where all the parties in interest are before the court. Equity has jurisdiction to determine the whole controversy in a single suit. It may settle and state the account against the estate of the deceased guardian, and render judgment for the amount found due from such estate against the surety.—*Zurfluh v. Smith*, 135 Cal. 644, 647, 67 Pac. 1089. In an action by a ward against the surety on his guardian's bond, the devastavit of the guardian is sufficiently averred in the petition without setting non-payment of the devastavit therein, such non-payment being matter of defense.—*Southern Surety Co. v. Jefferson (Okla.)*, 174 Pac. 563, 565. In an action against a surety company on a guardian's bond to recover a sum lost to the ward's estate through credit allowed the guardian in his final account on a falsely issue time deposit bank certificate attached to said account, the question as to the wrong suffered by such surety company at the hands of the bank by the wrongful issue of such certificate of deposit can not be adjudicated, and the bank can not be made a party in such action.—*Southern Surety Co. v. Jefferson (Okla.)*, 174 Pac. 563, 566.

(7) Same. Settlement as basis for. Appeal.—No action on a guardian's bond can be commenced in advance of the order of settlement; but the settlement of a guardian's account is a proceeding in which an appeal from the probate court to the supreme court may be taken at any time within sixty days after the entry of the order. During this time the proceeding is pending, and can not be made the basis of any new action. An action commenced before an appeal is taken, but within the sixty days allowed for an appeal, is premature.—*Cook v. Ceas*, 143 Cal. 221, 65 Pac. 65, 67. No action can be maintained against the sureties of an executor, or administrator, or guardian for breach of his bond until the amount of indebtedness has been determined by an order of the probate court.—*Nickals v. Stanley*, 146 Cal. 724, 726, 81 Pac. 117. The probate court has only a limited jurisdiction, and its proceedings are regulated and governed entirely by statute. It can settle accounts of administrators or guardians only

in the manner prescribed by the code. Where an administrator or guardian dies or absconds, or is beyond the jurisdiction of the court, the proper method, in order to ascertain whether he is liable, and to what extent, so as to bind the sureties on his official bond, is by a proceeding in the nature of a civil action, wherein the sureties are made parties and have an opportunity to be heard.—*Reither v. Murdock*, 135 Cal. 197, 67 Pac. 784. No action will lie against the sureties on a guardian's bond to recover a balance shown to be due by the guardian's account, until it has been settled in the probate court.—*Graff v. Mesmer*, 52 Cal. 636, 637.

(8) **Liability of sureties.** In general.—The sureties on a guardian's bond are prima facie bound by a recovery against their principal, although they were not parties to the suit, and they can relieve themselves only by showing that the amount recovered was in excess of the amount to which the plaintiff was entitled, or that he was not entitled to recover at all.—*Botkin v. Kleinschmidt*, 21 Mont. 1, 69 Am. St. Rep. 641, 52 Pac. 563, 564. An order of the probate court adjusting the amount due by a guardian does not bind the sureties, where the guardian never had notice of the proceeding.—*Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679, 682. The failure of a guardian's final account to show the amount of money actually invested in certain stocks and bonds, referred to in the findings, is not prejudicial to his bondsmen, where the money so paid, whatever the amount may have been, was received by the bondsmen of said guardian.—*In re Dow*, 133 Cal. 449, 65 Pac. 890, 892. In an action on the bond of a guardian of several minors, the surety can not escape liability on the ground that the bond is joint, instead of several, as to the obligees, nor on the ground that only one of the obligees is a party to the action. The fact that a guardian's bond is not in strict conformity with the statute does not vitiate it. The omission of the word "severally" does not weaken the bond, release the surety, nor deprive the individual ward from maintaining an action either against the guardian or his sureties. The nature of the guardian's duties is several, and would require a several inventory, and a several accounting and payment over to the wards, as they severally arrive at full age. A guardian's bond, though inartificially drawn or slightly defective, is sufficient to bind the obligors.—*Deegan v. Deegan*, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360, 362, 363, 22 Nev. 202, 37 Pac. 363. The general rule is, that the liability of a surety on an administrator's or guardian's bond depends upon the liability of the principal, and does not attach until that has been ascertained and determined by the judgment of a court of competent jurisdiction.—*Reither v. Murdock*, 135 Cal. 197, 198, 67 Pac. 784. Where a guardian, besides the bond given when he was appointed, gave two other bonds conditioned the same as the first, as additional security for the performance of his duties as guardian, all of the sureties upon the several bonds could be joined in one suit, to recover the amount

due from the guardian to his successor upon his removal as guardian.—*People's Bank & Trust Co. v. Nelson*, 37 Okla. 500, 132 Pac. 493. Under the law in force in the Indian Territory prior to statehood, sureties on a guardian's bond were liable for moneys misappropriated by him as such guardian whether before or after the execution of such bond.—*People's Bank & Trust Co. v. Nelson*, 37 Okla. 500, 132 Pac. 493. Where a surety bond is executed upon a consideration of a company organized to make such bonds for profit the company does not stand in the position of a surety for accommodation.—*United States F. & G. Co. v. Parker*, 20 Wyo. 29, 121 Pac. 536. A guardian who had been appointed by a district court in Montana died in another county of that state and an administratrix of his estate was appointed by the district court of the latter county. One of the wards presented a claim to the administratrix for moneys converted by the guardian. The claim was rejected, suit brought, and judgment rendered against the administratrix. Held in an action against the surety on the guardian's bond that a settlement of the guardian's accounts in the court of his appointment was not a condition precedent to the right to recover on the bond.—*United States F. & G. Co. v. Parker*, 20 Wyo. 29, 121 Pac. 534; *Same v. Nash*, 20 Wyo. 65, 121 Pac. 542. Under a guardian's bond which runs to several wards jointly the aggregate liability can not exceed the amount of the penalty whether recovery is had jointly or severally.—*United States F. & G. Co. v. Parker*, 20 Wyo. 29, 121 Pac. 536; *Same v. Nash*, 20 Wyo. 65, 121 Pac. 544. It is a general principal that sureties on a guardian's bond are liable only for the money or property that actually was or came into the hands of the guardian during the term covered by the bond on which they were sureties, and that penal bonds are never held to be retrospective in their operation unless plainly so intended and expressed.—*American Bonding Co. v. People*, 46 Colo. 394, 104 Pac. 83.

(9) *Same*. *Validity of bond*.—A guardian's bond is not a nullity, though there is absent from it the condition that "the guardian will faithfully execute the duties of his trust according to law," where such bond does contain other conditions for the breach of which an action may be brought.—*Southwestern Surety Ins. Co. v. Taylor* (Okla.), 173 Pac. 831, 835. It does not invalidate a guardian's bond, that the same is made payable to the state instead of the county judge, as provided by law, where the condition of the bond substantially conforms to the statute, showing for whose benefit it was given; such a party may maintain an action thereon regardless of the obligee named therein.—*Hickman v. Jackson* (Okla.), 164 Pac. 979.

(10) *Same*. *On sale bond*.—The sureties upon a guardian's special bond, given as a prerequisite to the sale of a ward's real estate, are not answerable for a misappropriation by the guardian of funds not arising from the sale of such property, in relation to which their bond was given.—*Smith v. Garnett* (Okla.), 161 Pac. 1083. Where a guard-

ian executed the bond required by the Oklahoma statute, and received the proceeds of the sale of land for his ward, and failed to turn over the same to his successor in office after settlement with the county court, and after he was ordered so to do by the court, he is estopped, in a suit on the bond against himself and his surety, to say that the court had no jurisdiction over the property, and to repudiate the trust and set up title thereto in himself; his surety is also estopped to set up title thereto in the guardian.—*Anderson v. Anderson*, 45 Okla. 653, 146 Pac. 709. The surety upon a guardian's sale bond, where property has been sold by the guardian and the proceeds squandered, will not be permitted in an action on the bond to deny the validity of the guardian's appointment or of the proceedings resulting in the sale, nor to deny that the guardian received the proceeds of the sale in his fiduciary capacity.—*Donnell v. Dansby*, 58 Okla. 165, 159 Pac. 317.

(11) *Same. On bond of former guardian.*—A minor, by his legal guardian, may maintain an action on the official bond of a former guardian.—*Lyons v. Fulsom*, 54 Okla. 84, 153 Pac. 868. If the county court finds a guardian indebted to his ward in a certain sum, and directs its payment, with a further direction to the newly appointed guardian to bring suit against the former guardian and his bondsmen, the judgment of that court rendered in such suit is final and binding upon the guardian and his sureties, and can not be collaterally attacked if no appeal has been taken therefrom.—*Cabell v. McLish* (Okla.), 160 Pac. 592. If a guardian, removed from office, fails to pay to his successor an amount shown to be due him by formal order of the county court settling his guardianship accounts, and a succeeding guardian neglects while in office to bring suit therefor, the ward during infancy may, by next friend, maintain an action against the first guardian and his surety for the recovery of the sum due him, although more than three years have elapsed from the removal of the first guardian before the commencement of such action.—*Brewer v. Perryman* (Okla.), 162 Pac. 791.

(12) *Same. Release from liability.*—The county court's power under the statute, in respect to relieving a surety from the obligation of the bond of a guardian, has reference only to future obligation, and not to that already accrued.—*Aetna Accident & Liability Co.* (Okla.), 174 Pac. 1046, 1049. A surety upon a guardian's bond may be released from future liability by the judge of the county court, if he complies with the statute relating thereto, but such release does not relieve him from liability incurred on account of the antecedent default of the guardian.—*American Bonding & Trust Co. v. Coons* (Okla.), 166 Pac. 887, 888. Where the surety upon a guardian's bond seeks to avoid liability while admitting the guardian's default by virtue of a release made by the judge of the county court, the burden is upon him to show that the guardian did not misappropriate the funds

of his ward while the bond was in force, prior to such release.—*American Bonding & Trust Co. v. Coons* (Okla.), 166 Pac. 887.

#### REFERENCES.

Bonds of guardians, additional and substituted, liability of sureties on, for past defaults.—See note 4 Am. & Eng. Ann. Cas. 345. Liability of sureties on guardian's bond for defalcation prior to the execution thereof.—See note 39 L. R. A. (N. S.) 961. Liability of sureties on general bond of guardian, as affected by a special bond.—See note 43 L. R. A. (N. S.) 308.

(13) **Defense to action. In general.**—In an action against a guardian for the conversion of funds belonging to minors, a plea that the guardian had expended money for the benefit of his wards, had paid out moneys for necessities for the minors, and was entitled to compensation out of the trust funds, does not constitute an affirmative defense. It is based on nothing more than a denial of the averments of the complaint.—*McDonald v. People*, 29 Colo. 503, 69 Pac. 703. In a suit by a guardian on a bond executed by his predecessor in office and a surety, pursuant to the statute of Oklahoma, it is no defense thereto that the land sold, and its proceeds which the guardian on settlement with the county court had been ordered to turn over to the plaintiff, were the property of the defendant guardian.—*Anderson v. Anderson*, 45 Okla. 653, 146 Pac. 709. The fraudulent withdrawal and conversion by the guardian of moneys deposited in bank by order of the court can not be set up as a defense to an action by the ward against the surety on the guardian's bond for a devastavit committed by such guardian with respect to such fund.—*Southern Surety Co. v. Jefferson* (Okla.), 174 Pac. 563, 566. A guardian's surety can not complain of delay by the ward in bringing an action based on the guardian's dilatoriness in accounting, if the action is brought within three years after the ward reaches adult age.—*Gronna v. Goldammer*, 26 N. D. 122, 133, 143 N. W. 122. Where a ward became of age in less than three years after his guardian died, and he did not sue his administrator for a devastavit until the expiration of six years from the time of the guardian's death, both the plaintiff's own laches and the statute prevent a recovery; and, where the plaintiff can not excuse his delay, a court of chancery will not interpose to remove the bar either of the statute of nonclaim or of the statute of limitations.—*Newberry v. Wilkinson* (Wash.), 199 Fed. 673, 689, 118 C. C. A. 111.

(14) **Same. Laches.**—Laches, like the statute of limitations, is a defense which must be alleged and proved by the defendant, unless the facts constituting it appear on the face of the complaint, in which case, as in the case of the statute of limitations, it must be urged by the defendant, by means of a demurrer, or in some other legal manner; otherwise it is waived. Hence if nothing appears on the face of the complaint, in an action on the guardian's bond, to indicate that the



defendant, or any person other than plaintiff, had suffered, or could have suffered, any loss or prejudice by plaintiff's delay in proceedings to compel an accounting by the guardian, the defense of laches must be alleged and proved. In order to constitute laches, there must be something more than mere lapse of time that would bar the statute of limitations. In order to bar a remedy because of laches, there must appear, in addition to mere lapse of time, some circumstances from which the defendant, or some other person, may be prejudiced, or there must be such lapse of time that it may be reasonably supposed that such prejudice would occur if the remedy was allowed.—Cook v. Ceas, 147 Cal. 614, 82 Pac. 370, 372. A delay of only three years and a little less than two months, under a statute which allows the period of four years in which to bring an action, is not, of itself, sufficient to raise any presumption or inference that the sureties on the bond of the guardian would be prejudiced thereby.—Cook v. Ceas, 147 Cal. 614, 82 Pac. 370, 372.

(15) Same. Conclusiveness of decree as to accounting.—The surety on a guardian's bond is not a necessary party to a proceeding for settling the guardian's account, so as to be entitled to notice of the proceeding.—Southern Surety Co. v. Jefferson (Okla.), 174 Pac. 563, 566. Sureties on such a bond are, in the absence of fraud, concluded by the decree of the court, duly entered in a hearing on an accounting, or final settlement, as to the amount of the principal's liability, although the sureties are not parties to the accounting.—Title Guaranty & Surety Co. v. Slinker, 35 Okla. 128, 128 Pac. 696; see also Southern Surety Co. v. Burney, 34 Okla. 552, 43 L. R. A. (N. S.) 308, 126 Pac. 748. A final valid order of the county, finding only the amount due from a guardian to his ward, is binding upon both the guardian and his bondsmen answerable therefor, as to such amount due, but it is not binding as to whether the obligation of a particular surety covers liability for a defalcation of such amount by the guardian.—Smith v. Garnett (Okla.), 161 Pac. 1083. A surety on a guardian's bond is bound, in the absence of fraud, by the order of the county court, settling the accounts of the guardian, and is estopped to set up the invalidity of the proceedings, although the surety was not a party to the accounting.—Southwestern Surety Ins. Co. v. Richard (Okla.), 162 Pac. 468, 470; Egan v. Vowell (Okla.), 167 Pac. 205, 206; Driskill v. Quinn (Okla.), 170 Pac. 495, 496; Title G. & S. Co. v. Cowen (Okla.), 177 Pac. 563, 564. A guardian appointed to succeed a widowed mother who had been guardian of her minor children and had filed a report and afterward appropriated her wards' estate, brought suit against the surety on the mother's guardianship bond. In her report the mother guardian had not made any charge for the support of the minor children. Held that the surety was precluded by the report from setting off an amount for such support in reduction of his liability on the bond.—In re Mackall, 60 Wash. 655, 111 Pac. 885.

(16) **Limitation of actions.**—A guardian and his sureties may be released by the probate court from all liabilities incurred, or from future liabilities, except as to persons laboring under some legal disability, and as to those persons, their rights are preserved for the statutory period after their disability ceases, whatever may be the form of the decree of the court.—*Racoullat v. Requefia*, 36 Cal. 651, 655. In California there is one rule which prohibits an action on the bond of a guardian's surety until there is a final order settling the guardian's account, and another rule barring the action in three years after the removal or discharge of the guardian; and the latter rule must, no doubt, be enforced, even where, without the fault of the ward, a final settlement of the account has not been obtained within three years after the removal or discharge; but the sureties on guardians' bonds have an ample measure of protection against their claims by taking advantage of the general statute of limitations. Such last-named rule applies to an action after a final order of the court removing or discharging the guardian. It does not apply to the termination of a guardianship by the ward after attaining majority.—*Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65, 69. When a ward arrives at the age of majority, the authority of the guardian comes to an end; but, although his authority is at an end when his ward becomes of age, it can not be said that, in any ordinary, or usual, or statutory sense of the terms, he has been removed or discharged. The statute of limitations therefore does not, in terms, apply to such a case.—*Cook v. Ceas*, 143 Cal. 221, 230, 77 Pac. 65. An action against the sureties of a guardian is not barred until three years after a final order of court removing or discharging the guardian.—*Cook v. Ceas*, 143 Cal. 221, 230, 77 Pac. 65. Under the provision of the statutes of this state a cause of action accrues against the sureties on a guardian's bond, when the guardian is relieved of his office and upon a formal settlement of his accounts an indebtedness is shown to exist in his ward's favor, and the statute of limitations then begins to run on behalf of the sureties, unless the person entitled to sue is under a legal disability.—*Title G. & S. Co. v. Cowan* (Okla.), 177 Pac. 363, 365. An action by a guardian against the sureties of his predecessor on their bond to recover the amount of their principal's default to the estate of the ward is not barred by the statute of limitations if instituted within three years from the day of the settlement made by the judge of the county fixing the former guardian's liability to the ward, and if instituted during the minority of the ward.—*Driskill v. Quinn* (Okla.), 170 Pac. 495, 497. If a ward, after he becomes of age, fails to present, within the prescribed time, a claim against the estate of his deceased guardian, for a devastavit, such failure, in the absence of fraud or of equitable considerations, bars his right to sue either the administrator of the estate or his surety.—*Newberry v. Wilkinson* (Wash.), 199 Fed. 673, 689, 118 C. C. A. 111. An action against the sureties on a guardian's bond must be commenced within three years

after the discharge of the latter, or his removal, but if the person entitled to bring the action is at the time of such discharge, under a legal disability to sue, the action may be commenced at any time within three years after the removal of the disability.—*Title G. & S. Co. v. Cowan* (Okla.), 177 Pac. 563, 564. The time when the statute of limitations begins to run against the surety of a defaulting guardian, on his liability on the bond, is that of the entry of the court's order discharging or removing the guardian after an accounting has been had.—*United States F. & G. Co. v. Citizens State Bank*, 36 N. D. 16, 31, 161 N. W. 562. A cause of action against the sureties on a guardian's bond accrues when the guardian is relieved of office by order of the county court, and his account, showing an indebtedness to his ward, is finally settled by that court; whereupon the statute of limitations immediately begins to run as to such cause of action, if the person then entitled to bring the action is under no legal disability to sue.—*Brewer v. Perryman* (Okla.), 162 Pac. 791.

#### REFERENCES.

Limitation of actions or suits to compel guardian to account, or to recover on his bond.—See note 47 L. R. A. (N. S.) 451.

23. Limitations of actions.—A California statute prescribing three years next after the termination of the guardianship of a minor for a recovery, by the minor, or his grantee, of real estate sold by the guardian has no application to a case where there was no guardian, and no sale by a guardian, appointed by a probate court in this state. Neither does a statute prescribing three years next after the sale of an estate by an executor or administrator, under the provisions of the probate law, for the recovery of the real estate sold, have any application, where the premises in controversy were not subject to sale, and were not sold under its provisions.—*McNeill v. First Congregational Soc.*, 66 Cal. 105, 111, 4 Pac. 1096. So under a statute providing that "no action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship; or, when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years after the removal thereof," and where a patent from the government has been issued to certain land sold by an administrator and guardian, an action of ejectment brought to recover such land, although the sale was void, is barred, where more than twenty years were allowed to pass after the minors, and each of them, because of age, and after the termination of the guardianship, and more than three years after the issuance of the patent, before such action was commenced.—*Reed v. Ring*, 93 Cal. 96, 28 Pac. 851, 853. A complaint in a suit to obtain a decree adjudging a mortgage, executed by a guardian, to be a valid lien on the interest of his wards in the property covered thereby, and directing a sale

thereof to pay the note for which the mortgage was given, is not a complaint in an action for relief upon the ground of mistake, where both the guardian and plaintiff believed originally that the mortgage was good and valid, but their mistake in that respect was not discovered until within three years prior to the commencement of such action, and where the discovery by the plaintiff, as to the invalidity of his mortgage, was not made until after the statute would have barred it, had it been a valid mortgage. Plaintiff could not be placed in any better position by reason of his mistake as to the validity of his mortgage than he would have been in had his mortgage been valid and there had been no mistake.—*Banks v. Stockton*, 149 Cal. 599, 87 Pac. 83, 84. In case of fraud, the statute of limitations, in an action against a guardian to obtain an accounting in equity, does not commence to run until three years after the discovery, by the aggrieved party, of the facts constituting such fraud.—*Lataillade v. Orefia*, 91 Cal. 565, 577, 25 Am. St. Rep. 219, 27 Pac. 924. Action to set aside a void sale by a guardian where the purchaser has taken and retains possession must be brought within five years after the recording of the guardian's deed or within two years after removal of plaintiff's disability, under Comp. Laws of Oklahoma, 1909, sections 5547-5549.—*Dodson v. Middleton*, 38 Okla. 763, 135 Pac. 369. The five year limitation prescribed by section 5608 of the General Statutes of 1909, of the state of Kansas, does not apply in an action for the recovery of land which was sold by one as guardian who had not been so appointed.—*Harrison v. Miller*, 87 Kan. 48, 123 Pac. 854. A cause of action against a guardian for a balance of money due to his ward at the time the latter reached the age of majority accrues at that time, and is a liability created by statute, to which the three year period of limitation prescribed by the statute applies.—*Hawk v. United States Fidelity & Guaranty Co.*, 83 Kan. 775, 112 Pac. 602. Where a minor over the age of 14 years, represented by her guardian, is defendant in error, the minor is the real party in interest, not being a "codefendant" of her guardian, nor a "joint contractor," or "otherwise united in interest with him," and the summons in error must be served upon the minor, or her attorney of record, within the time allowed by law for prosecuting a proceeding in error; service upon her guardian fails to comply with the statute, and does not give the supreme court jurisdiction over the minor; hence, a motion to dismiss the proceeding in error for want of necessary parties must be sustained.—*Welch v. Welch*, 49 Okla. 337, 152 Pac. 828. A judgment, conferring rights of majority upon a minor Creek freedman allottee regardless of fraud in its procurement, is ineffectual and void in so far as it purports to empower him to transact business as an adult with reference to the proceeds of his allotted and inherited lands, or to personally maintain an action for the recovery thereof; and, if he does bring such an action, during the period of his legal disability of minority, the statute of limitations is no defense though more than three years have elapsed

since such judgment.—*Brewer v. Dodson* (Okla.), 159 Pac. 329; *Brewer v. Berryman* (Okla.), 162 Pac. 791. The statute of limitations does not begin to run in favor of a guardian until a formal order of the court discharging or removing him, shall have been made.—*Gronna v. Goldammer*, 26 N. D. 122, 143 N. W. 394. In cases where the disability of a person entitled to sue exists when the right of action accrues, the statute of limitations does not begin to run during the continuance of the disability.—*Title G. & S. Co. v. Cowan* (Okla.), 177 Pac. 563, 564. Under the provisions of section 352, Code of Civil Procedure of California, the statute of limitations does not begin to run against a minor until he reaches 21 years of age, so as to bar an action for the return of money paid on account of a contract entered into during minority and afterwards disaffirmed.—*Maler v. Harbor Central Land Co.* (Cal. App.), 182 Pac. 345, 346, 347. The statute of limitations does not begin to run against an action to set aside a void conveyance of an Indian minor allottee to his or her allotted lands, executed after the passage and approval of the act of congress of May 27, 1908, until such minor has attained his or her majority.—*Bell v. Fitzpatrick* (Okla.), 157 Pac. 334. Where a statute of limitations excepts persons laboring under disabilities from its operation, without mentioning infants specifically, infants are within the saving clause, and the statute does not run against them during their minority, even though such infant has a guardian who might maintain the action.—*Title G. & S. Co. v. Burton* (Okla.), 170 Pac. 1170, 1172. If land is sold by a guardian under order of the probate court, the purchaser thereof, after the lapse of five years from and after the date of the recording of the guardian's deed is not barred under the provisions of the Oklahoma statute of limitations from bringing suit against one who is and has been in possession thereof for more than one year, taking the rents and profits therefrom and claiming to be the owner thereof under a title having no relation to the guardianship proceeding.—*Drennan v. Harris* (Okla.), 161 Pac. 781.

#### 24. Appeal.

(1) In general.—The remedy for one aggrieved by an order or judgment of a probate court, in the matter of the appointment of guardians, is in the court where such proceedings are had, by proper motion or by appeal. Such order or decree can not be attacked collaterally.—*Clark v. Rossier*, 10 Ida. 348, 3 Ann. Cas. 231, 78 Pac. 358. An appeal, and not certiorari, is the proper remedy to review an order appointing a guardian for an aged person, without notice to him, or inquisition of any kind.—*State of Denney*, 34 Wash. 56, 74 Pac. 1021. An appellate court has no authority "to make" an accounting, and an original allowance for counsel fees, incurred by a guardian in defense of his accounts in proceedings in error.—*Nagle v. Robins*, 9 Wyo. 211, 62 Pac. 796. A guardian removed by order of the county court is authorized to appeal, in connection with the heirs, from such order

to the circuit court.—*In re Olson*, 10 S. D. 648, 75 N. W. 203. Where the ward files a petition to set aside former orders made settling the accounts of his guardian, and to reopen them on the ground of fraud, and the guardian appeals, such appeal will be considered as an appeal from a decree in equity, and where it is taken upon the judgment roll alone, documents inserted in the record, which are not authenticated by any bill of exceptions, can not be considered for any purpose.—*Guardianship of Wells*, 140 Cal. 349, 351, 73 Pac. 1065. An appeal from an order appointing a guardian can not be taken before the order is entered.—*In re Dunphy's Estate*, 158 Cal. 1, 109 Pac. 627. The district court, not having jurisdiction to appoint a guardian, its refusal to do so can not be assigned as error on appeal.—*Parker v. Lewis*, 45 Okla. 807, 813, 147 Pac. 310.

(2) *Appealable orders.*—If a county court has lost jurisdiction of the subject-matter, by reason of a settlement between a guardian and his ward, and there has been a release of the guardian by the ward after the latter has attained majority, the ward has no power to require the guardian to account, and the order of the court, in such a case, would, in effect, be a judgment, without power, in a new proceeding. Such order is therefore appealable.—*Richardson's Guardianship*, 39 Or. 246, 64 Pac. 390, 392. In such a case, jurisdiction is not conferred upon the county court by the guardian's appearance therein for the purpose of pleading a settlement of his accounts with the ward; for, while jurisdiction of the person may be conferred in this manner, jurisdiction of the subject-matter can not be waived by the parties, and may be raised at any time. If the guardian settled with the ward after the latter attained his majority, the jurisdiction of the county court to cancel a settlement must necessarily be extinguished, for the guardian, in effecting such settlement, complied with the condition of his bond; and the rule is well settled that transactions between the guardian and ward after the latter becomes of age, or has attained majority upon being married, are beyond the jurisdiction of the county court.—*Richardson's Guardianship*, 39 Or. 246, 64 Pac. 390, 392, 393. If an order permitting a foreign guardian to sue is vacated, he has no right to further maintain the action; and the order vacating and setting aside the former order is therefore appealable.—*In re Crosby*, 42 Wash. 366, 85 Pac. 1, 2.

(3) *Findings.*—While findings may not be necessary in settling accounts in probate, and are therefore not to be considered upon appeal, yet it is otherwise where the case was not strictly a settlement of account in probate, but was in the nature of an action in equity to set aside an order settling the account of the guardian for fraud and to compel a proper account. If the pleadings on both sides, in such a case, are drafted, in effect, as they would be in a suit directly in equity to set aside the order settling the account, and the findings and decree made and entered are such as would follow the trial of such an action, and no objection is raised to the form of the petition, and the guardian

waives any objection to the jurisdiction of his person by answering the petition, the petition will be deemed a bill in equity, invoking the equitable powers of the court, notwithstanding it is entitled "In the Matter of the Estate of Guardianship," etc., of the minor named. It is true that the probate jurisdiction of the superior court is separate and distinct from its equity jurisdiction, yet the same tribunal exercises both.—*In re Wells's Estate*, 140 Cal. 349, 73 Pac. 1065, 1066. A finding, on a contest of the settlement of a guardian's account, that all the items thereof, as presented, are true and correct, must be taken as conclusive, where the evidence is not brought up on appeal.—*Guardianship of Dow*, 133 Cal. 446, 450, 65 Pac. 890. In an action in the nature of an accounting brought against the representative of a deceased guardian by the ward more than six years after the final settlement of the guardian in the probate court and the attainment of the majority of the ward and where it appears from the evidence that the mistake or constructive fraud could have been discovered at the time of the settlement, the finding of the court that the ward has been guilty of laches and can not maintain the action will not be disturbed.—*Rogers v. Lindsay*, 89 Kan. 180, 131 Pac. 611. Upon a petition to revoke letters of guardianship of an incompetent person, and to appoint petitioner as guardian, where the order for the citation to issue is in the record, but not the citation itself, though the record recites that citation was issued pursuant to the order, and the guardian came in and answered fully, she has no cause to complain upon appeal that the citation had no sufficient statement of the proceeding to enable her to answer the petition.—*Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594.

(4) *Effect of, as stay.*—If the guardian of a minor child has been removed, and the order of removal appealed from, the effect of such appeal is to stay proceedings in the matter of the appointment of a general guardian of the person of the minor until the determination of the appeal. Hence, a petition for letters of general guardianship to be issued to another, pending such an appeal, is properly refused.—*Guardianship of Van Loan*, 142 Cal. 429, 433, 76 Pac. 39. The power of one appointed guardian of the person and estate of an incompetent person is stayed pending an appeal from the order of appointment, by the filing of the undertaking on appeal provided for by section 941 of the Code of Civil Procedure. If the guardian, notwithstanding such appeal, threatens to take possession of the property of the incompetent and to act as his guardian pending the appeal, a writ of super-sedeas will be issued against him.—*Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26.

(5) *Dismissal.*—Under section 372 of the Code of Civil Procedure of California, it seems that a ward shall himself be a party to a suit which shall bind his estate; that an appeal must be taken in his name; and that an appeal taken in the name of the guardian should be dismissed.—*Estate of Callaghan*, 119 Cal. 571, 576, 51 Pac. 860, 39 L. R. A. 689. Where an infant was represented in the trial court by a guardian, the

time for an appeal by such infant is governed by the same rules which apply to the case of an appeal by an adult; where no præcipe for summons in error is issued to a necessary party defendant within six months after the final judgment or order in the trial court, the appeal will be dismissed.—*Peaden v. Brown*, 49 Okla. 317, 151 Pac. 1166. An appeal from a judgment against a guardian in an action prosecuted by him in his own name as guardian, must be commenced within one year after the rendition of the judgment, and all necessary parties to the proceeding must be brought into the appellate proceedings, either by summons in error or by entry of general appearance, within that period, or the appeal will be dismissed.—*John v. Paullin*, 24 Okla. 636, 104 Pac. 365. The omission to give a bond for costs on appeal from the district court to the circuit court of appeals at the time of taking the appeal is not ground for the dismissal of the appeal, provided that the bond be filed within a reasonable time thereafter, and especially is this true where, as in this case, the appellee is in no wise prejudiced by the delay in filing the bond.—*Corcoran v. Kostrometinoff* (Alaska), 164 Fed. 685, 686, 91 C. C. A. 619. The rights of the parties to an appeal from an order of the district court dismissing an appeal from an order of a United States commissioner as ex-officio probate judge, approving an account of a guardian and discharging him, are not affected by the fact that the district court, upon findings which should have led to a decree affirming the decision of the commissioner's court, entered instead thereof a decree of dismissal.—*Corcoran v. Kostrometinoff* (Alaska), 164 Fed. 685, 686, 91 C. C. A. 619.

(6) **Record. Presumption.**—Where the report of a guardian, and the exceptions thereto, constitute the pleadings in a case, they are an indispensable portion of the record, and should be incorporated therein. Unless this is done, on appeal from a decree entered in favor of a guardian, the court must fall back on the presumption that the decree rendered below was justified by the facts and record before the court.—*Lowe v. Smith*, 20 Colo. App. 273, 78 Pac. 310, 311. Where the record shows the giving of a notice to a ward of the hearing of his guardian's application for leave to sell his real estate, and such notice is for any reason unavailing, it can not be presumed from the fact that the sale was confirmed by the probate court that any other notice was given.—*Beachy v. Shomber*, 73 Kan. 62, 84 Pac. 547.

(7) **Affirmance. Reversal.**—When a decree allowing a final account is found by the appellate court to be erroneous as to any item or items, that court may direct the decree to be corrected, and, as corrected, affirm it.—*Estate of Schandoney*, 133 Cal. 387, 394, 65 Pac. 877. Although a court sets aside and dismisses all proceedings in the matter of a guardianship, instead of allowing the petition to stand, and allowing it to be contested, that is not of sufficient importance to justify a reversal.—*Guardianship of Van Loan*, 142 Cal. 423, 429, 76 Pac. 37. In an action by a mother for an accounting of guardianship of her estate



by her son, the value of which was determined, in which the son set up a counter claim for board and lodging of the mother which the trial court disallowed, where the only question upon appeal from the judgment relates to the disallowance of such counterclaim, and the record upon appeal shows no agreement or understanding that such board and lodging was to be paid for, the only question is whether such promise could be implied; and where the circumstances are such as to warrant the trial court in inferring as a fact that no promise was implied, the judgment must be affirmed.—*Crane v. Derrick*, 157 Cal. 667, 109 Pac. 31. Upon appeal by a mother after the death of the father, from an order refusing her petition for appointment as guardian of the person and estate of her young child three years of age, upon a finding of her unfitness to have the care and custody of the child, where the evidence fails to sustain such finding, the judgment and order denying her petition must be reversed.—*Estate of Lindner*, 13 Cal. App. 208, 109 Pac. 492. Section 966 of the Code of Civil Procedure of California, providing that "when the judgment or order appointing an executor or administrator, or guardian is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed," does not give the guardian the right to act as such during the pendency of the appeal.—*Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26. A guardian should be allowed all necessary expenses in caring for the ward's person and estate, but the judgment of the lower court should be followed unless it appears that the same is contrary to the preponderance of the evidence and not made with due consideration of all the pertinent facts.—*In re Bayer*, 80 Wash. 340, 141 Pac. 684.

(8) Review.—The district court has jurisdiction in a proper case to review and to vacate an order of the county court approving the final account of a guardian of infants.—*Francis v. Sperry* (Okla.), 176 Pac. 732, 734. The supreme court, on appeal from an order setting aside a final decree settling the account of a guardian, has no concern as to what theory the lower court proceeded upon, where there is nothing in the record to ascertain it.—*State (ex rel. McHatton) v. District Court*, 55 Mont. 324, 176 Pac. 608. On the final settlement of a guardian's account it is in the court's discretion to allow attorneys' fees, and, in the absence of a clear abuse thereof, its action will not be disturbed.—*In re Allard Guardianship*, 49 Mont. 219, 141 Pac. 661. Where the compensation and attorneys' fees allowed to a guardian appear to be just and reasonable, there is no reason on appeal for disturbing the action of the court below in the settlement of his accounts.—*Kerr v. Weathers*, 49 Okla. 574, 153 Pac. 866. Where a motion to provide for a change in the temporary custody of a minor was presented to the court, and the action of the court in granting a

change of custody can be sustained by any evidence whatsoever, which was presented to the trial court, however slight that evidence may be, the conclusion there reached will not be disturbed on appeal.—Clark v. Superior Court, 20 Cal. App. 305, 128 Pac. 1018, 1019.

REFERENCES.

Guardian and ward in general. See Kerr's Cal. Cyc. Code Civ. Proc., §§ 1747-1760, and notes.

## CHAPTER VII.

## GUARDIANS OF INSANE AND OTHER INCOMPETENT PERSONS.

- § 161. Notice of time and place of hearing, and certificate of inability to attend.
- § 162. Appointment of guardian by court after hearing.
- § 163. Appointment as guardian.
- § 163.1 Appointment, by will or deed.
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- § 165. Form. Petition for appointment of guardian of incompetent person.
- § 166. Form. Order for notice of hearing of petition for guardianship. Incompetent person.
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- § 172. Form. Order to show cause why order of sale of incompetent's real estate should not be granted.
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- § 174. Proceeding for restoration to capacity.
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- § 176. Form. Judgment of restoration to capacity.
- § 177. Definition of "incompetent."
- § 177.1 Procedure for admission of incompetents, other than insane persons, into the home for feeble-minded.

## GUARDIANSHIP OF INSANE PERSONS AND OTHER INCOMPETENTS.

- |                            |                                       |
|----------------------------|---------------------------------------|
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| (4) Statutory provisions.  | (2) Notice and personal presence.     |
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**§ 161. Notice of time and place of hearing, and certificate of inability to attend.**

When it is represented to the superior court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced on the hearing, provided that when such person is a patient at a state hospital in this state, the certificate of the medical superintendent or acting medical superintendent of such state hospital, to the effect

that such patient is unable to attend such hearing shall be prima facie evidence of such fact.—*Kerr's Cyc. Code Civ. Proc.*, § 1763.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska—Compiled Laws of 1913, section 1727.
- Arizona—Revised Statutes of 1913, paragraph 1132.
- Colorado—Mills's Statutes of 1912, sections 7900, 7912.
- Idaho—Compiled Statutes of 1919, section 7856.
- Kansas—General Statutes of 1915, section 6098; Laws of 1917, page 212.
- Montana—Revised Codes of 1907, section 7764.
- Nevada—Revised Laws of 1912, section 6162.
- North Dakota—Compiled Laws of 1913, sections 8527, 8886.
- Oklahoma—Revised Laws of 1910, section 6538.
- Oregon—Lord's Oregon Laws, section 1320.
- South Dakota—Compiled Laws of 1913, section 5996.
- Utah—Compiled Laws of 1907, section 4000.
- Washington—Laws of 1917, chapter 156, page 698, section 197.
- Wyoming—Compiled Statutes of 1910, section 451.

#### § 162. Appointment of guardian by court after hearing.

If, after a full examination and hearing upon such petition, it appears to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate or person or estate, with the powers and duties in this chapter specified.—*Kerr's Cyc. Code Civ. Proc.*, § 1764.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1727.
- Arizona—Revised Statutes of 1913, paragraph 1133.
- Colorado—Mills's Statutes of 1912, section 7912.
- Hawaii—Revised Laws of 1915, section 3024.
- Idaho—Compiled Statutes of 1919, section 7857.
- Kansas—General Statutes of 1915, section 6100.
- Montana—Revised Codes of 1907, section 7765.
- Nevada—Revised Laws of 1912, sections 6162, 6163.
- New Mexico—Statutes of 1915, section 3388.
- North Dakota—Compiled Laws of 1913, section 8887.
- Oklahoma\*—Revised Laws of 1910, section 6539.
- Oregon—Lord's Oregon Laws, section 1320.

South Dakota—Compiled Laws of 1913, section 5997.  
 Utah—Compiled Laws of 1907, section 4000.  
 Washington—Laws of 1917, chapter 156, page 698, section 197.  
 Wyoming—Compiled Statutes of 1910, section 454.

**§ 163. Appointment as guardian.**

In awarding letters of guardianship of the person and estate, or person or estate, of an insane or incompetent person, the court shall appoint as guardian such person as may have been designated pursuant to section two hundred forty-two of the Civil Code, in which cases such persons shall be appointed unless good cause to the contrary be shown.—*Kerr's Cyc. Code Civ. Proc.*, § 1764a.

**§ 163.<sup>1</sup> Appointment, by will or deed.**

A guardian of the person or estate, or of both, of an insane or incompetent person may be appointed by will or deed, to take effect upon the death of the person appointing:

1. If the insane or incompetent person be unmarried, or be a person whose marriage has been annulled or dissolved by death or divorce, by the father, with the written consent of the mother, or by either parent if the other be dead or incapable of consent.

2. If the insane or incompetent person be married and a person whose marriage has not been annulled or dissolved by divorce, then by the spouse.—*Kerr's Cyc. Civ. Code*, § 242.

**§ 164. Form. Petition for appointment of guardian of insane person.**

[Title of court.]

[Title of guardianship.]

{ Department No. —.  
 { [Title of form.]

To the Honorable the — Court<sup>1</sup> of the County<sup>2</sup> of —, State of —.

Your petitioner hereby respectfully represents: That he is a relative<sup>3</sup> of —,<sup>4</sup> of the county<sup>5</sup> of —, state of —;

That the said — has property, both real and personal,<sup>6</sup> in said county<sup>7</sup> and state, particularly described as follows, to wit: —;<sup>8</sup>

That the said — is about — years of age, is now insane,<sup>9</sup> and is incapable of taking care of himself or of managing his property.

Your petitioner therefore prays that he<sup>10</sup> be appointed guardian of the person and estate of the —. —, Attorney for Petitioner. —, Petitioner.

[Add ordinary verification.]

Explanatory notes.—1 Or, to the judge of the court. 2 Or, City and County. 3 State relationship, or that he is a friend, etc. 4 Name of insane person. 5 Or, City and County. 6 Or as the case may be. 7 Or, City and County. 8 Describe the property. 9 Give brief statement of mental and physical condition of such person, for information of the court. 10 Or as the case may be.

**§ 165. Form. Petition for appointment of guardian of incompetent person.**

[Title of court.]

[Title of guardianship.]

{ Department No. —.  
[Title of form.]

To the Honorable the — Court<sup>1</sup> of the county<sup>2</sup> of —, State of —.

Your petitioner hereby respectfully represents: That he is a relative<sup>3</sup> of —,<sup>4</sup> of the county<sup>5</sup> of —, state of —;

That the said — is about — years of age, and has property, both real and personal, in said county<sup>6</sup> and state, which needs care and attention, the exact nature and description of which is to your petitioner unknown; and

That the said — has, by reason of —,<sup>7</sup> become mentally incompetent either to care for himself or to manage his property.

Your petitioner therefore asks that he be appointed guardian of the person and estate of said —.

—, Attorney for Petitioner. —, Petitioner.

[Add ordinary verification.]

*Explanatory notes.*—1 Or to the judge of the court. 2 Or, City and County. 3 State relationship, or that he is a friend, etc. 4 Name of incompetent. 5, 6 Or, city and county. 7 State causes of incompetency.

**§ 166. Form. Order for notice of hearing of petition for guardianship. Incompetent person.**

[Title of court.]

[Title of matter.]

{ No. —. 1 Dept. No. —.  
[Title of form.] }

It having been represented to the court by the verified petition of — and —<sup>2</sup> of the above-named —, that the said — is insane, and mentally incompetent to manage his property, —

It is ordered by the court, That a hearing of the said petition be had at the court-room of this court, Department No. — thereof, in the court-house,<sup>3</sup> on the — day of —, 19—, at — o'clock in the forenoon<sup>4</sup> of the said day, and that notice of the time and place of said hearing, and of the nature of said petition, be given to the said — not less than five days<sup>5</sup> before the day appointed therefor, as aforesaid.

—, Judge of the — Court.

Dated —, 19—.

*Explanatory notes.*—1 Give file number. 2 Relative or friend. 3 Name location of court-house. 4 Or, afternoon. 5 An order and notice is insufficient where it merely specifies a day for hearing, without any specification of hour or place; and if a hearing has been adjourned until "March 3d," it can not be heard on March 2d. If so heard, and an order made, the order is premature and without authority, and may be collaterally attacked.—*McGee v. Hayes*, 127 Cal. 336, 339, 78 Am. St. Rep. 57, 59 Pac. 767.



**§ 167. Form. Order appointing guardian of incompetent person.**

[Title of court.]

[Title of estate and guardianship.]<sup>1</sup>

{ No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

Now comes —, the petitioner herein, by Mr. —, his attorney, and proves to the satisfaction of the court that his petition was filed herein on the — day of —, 19—; that thereupon the court made an order appointing the — day of —, 19—, as the time for hearing the same, and directing that notice of the time and place of such hearing be given; that due notice of the time and place of the said hearing was personally served on the said — not less than five days<sup>3</sup> before the time so appointed,<sup>4</sup> and the said — appearing in person,<sup>5</sup> the court thereupon proceeds to the hearing and examination upon said petition, and, after hearing the evidence, finds that said — is incapable of taking care of himself and managing his property,<sup>6</sup> and that said petition ought to be granted.

It is therefore ordered, adjudged, and decreed by the court, That said — is incapable of taking care of himself, and managing his property,<sup>7</sup> and that — be appointed guardian of the person and estate of said —, and that letters of guardianship be issued accordingly, upon his giving bond as such guardian in the sum of — dollars (\$—) and taking the oath required by law.

—, Clerk.

Entered —, 19—.

By —, Deputy.<sup>8</sup>

**Explanatory notes.**—<sup>1</sup> As, In the Matter of the Estate and Guardianship of John Stiles, an Incompetent Person. <sup>2</sup> Give file number. <sup>3</sup> Or as provided by statute. <sup>4</sup> If the matter has been continued, say: "and said hearing having been regularly postponed to this time." <sup>5</sup> Or, it being also shown to the satisfaction of the court that the said — is not able to attend in court at this hearing, and can not be produced. <sup>6, 7</sup> And is insane. <sup>8</sup> See note to § 77, ante.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Washington—Laws of 1917, chapter 156, page 703, section 210.

**§ 168. Powers and duties of such guardians.**

Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward and the management of all his estate, or the care and custody of the person of his ward or the management of all his estate, according to the order of appointment, until such guardian is legally discharged, and he must give bond to such ward in like manner and with like conditions as before prescribed with respect to the guardian of a minor.—*Kerr's Cyc. Code Civ. Proc.*, § 1765.

<sup>1</sup> Guardian to pay debts out of ward's estate. See ante, § 105.

Note.—The property of an incompetent person shall not be leased for a longer period than ten years. See *Kerr's Cyc. Civ. Code*, § 718.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1729.

Arizona—Revised Statutes of 1913, paragraph 1134.

Colorado—Mills's Statutes of 1912, sections 7923, 7939. Power of representative to sell or mortgage real estate of incompetent, see Laws of 1915, chapter 176, page 503, section 18; amended, Laws of 1917, chapter 68, page 214.

Hawaii—Revised Laws of 1915, section 3025.

Idaho—Compiled Statutes of 1919, section 7858.

Kansas—General Statutes of 1915, sections 6103, 6104.

Montana—Revised Codes of 1907, section 7766.

Nevada—Revised Laws of 1912, section 6164.

New Mexico—Statutes of 1915, section 3408; as amended by Laws of 1917, chapter 62, page 182, relative to the sale or conveyance of a lunatic's real estate.

North Dakota\*—Compiled Laws of 1913, section 8888.

Oklahoma—Revised Laws of 1910, section 6540.

Oregon—Lord's Oregon Laws, section 1321.

South Dakota\*—Compiled Laws of 1913, section 5998.

Utah—Compiled Laws of 1907, sections 3991, 4003-4008.

Washington—Laws of 1917, chapter 156, page 699, sections 202-218.

Wyoming—Compiled Statutes of 1910, section 474.

**§ 168.<sup>1</sup> Guardian of insane person may receive proceeds of sale of such party's interest.**

The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs,

whose interest in real property has been sold (in partition proceedings), may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing with sufficient sureties an undertaking approved by a judge of the court, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled or to his legal representative.—*Kerr's Cyc. Code Civ. Proc.*, § 794.

**§ 168.<sup>2</sup> Guardian may consent to partition without action, and execute releases.**

The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf, to the owners of the shares of the parts to which they may be respectively entitled, upon an order of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 795.

**Note.**—Payment to guardian, of share of infant sold in partition proceedings. See ante, § 112.

**§ 169. Form. Notice of sale of real estate by guardian of incompetent person.**

[Title of court.]

[Title of guardianship.]<sup>1</sup>

{ No. —. Dept. No. —.  
[Title of form.]

Notice is hereby given, That, pursuant to the order of the —<sup>3</sup> court of the county<sup>4</sup> of —, state of —, made on the — day of —, 19—, in the matter of the estate of said —, an incompetent person, the undersigned, guardian of the person and estate of said incompe-

tent person, will sell at probate sale, as a whole, to the highest bidder, upon the terms and conditions hereinafter mentioned, and subject to confirmation by said —<sup>5</sup> court, on or after the — day of —, 19—, all the right, title, interest, and estate of the said —, an incompetent, being and undivided one fourth,<sup>6</sup> in and to that certain lot, piece, or parcel of land situate, lying, and being in the county<sup>7</sup> of —, State of —, particularly bounded and described as follows, to wit: —.<sup>8</sup>

Terms and conditions of sale: Cash, in gold coin of the United States of America; ten (10) per cent of the purchase-money to be paid at the time of sale; balance on confirmation of sale. Bids or offers must be in writing, and may be left at the office of —, attorney for said guardian, at —,<sup>9</sup> or may be delivered to said guardian personally, or may be filed in the office of the clerk of said court.

Dated —, 19—.

—, Guardian of the Person and Estate of —, an Incompetent Person.

—, Attorney for said Guardian.<sup>10</sup>

Explanatory notes.—1 As, In the Matter of the Guardianship of the Person and Estate of —, an Incompetent Person. 2 Give file number. 3 Title of court. 4 Or, city and county. 5 Title of court. 6 Or other fractional part. 7 Or, city and county. 8 Describe the land. 9 Name the place. 10 Give address.

**§ 170. Form. Notice of guardian's sale of incompetent's real estate at private sale.**

[Title of court.]

[Title of guardianship.]

{ No. —.1 Dept. No. —.  
[Title of form.]

Notice is hereby given, That, pursuant to the order of the —<sup>2</sup> court of the county<sup>3</sup> of —, state of —, made on the — day of —, 19—, in the matter of the estate of said —, an incompetent, the undersigned, guardian of the person and estate<sup>4</sup> of said incompetent, will sell at private sale, as a whole, to the highest bidder,

upon the terms and conditions hereinafter mentioned, and subject to confirmation by said —<sup>5</sup> court, on or after the — day of —, 19—, all the right, title, interest, and estate of the said —, an incompetent, being an undivided one fourth,<sup>6</sup> in and to that certain lot, piece, or parcel of land situate, lying, and being in the county<sup>7</sup> of —, state of —, particularly bounded and described as follows, to wit: —.<sup>8</sup>

Terms and conditions of sale: Cash, in gold coin of the United States; ten (10) per cent of the purchase-money to be paid at the time of the sale; balance on confirmation of sale. Bids or offers must be in writing, and may be left at the office of —, attorney for said guardian, at —,<sup>9</sup> or may be delivered to said guardian personally, or may be filed in the office of the clerk of said court.

Dated —, 19—.

—, Guardian of the Person and Estate<sup>10</sup> of —, an Incompetent.

—, Attorney for said guardian.<sup>11</sup>

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Title of court. <sup>3</sup> Or, city and county. <sup>4</sup> Or, of the estate. <sup>5</sup> Title of court. <sup>6</sup> Or other fractional part. <sup>7</sup> Or, city and county. <sup>8</sup> Describe the land. <sup>9</sup> Name the place. <sup>10</sup> Or according to the fact. <sup>11</sup> Give address.

**§ 171. Form. Order to show cause why order of sale of insane person's real estate should not be granted.**

[Title of court.]

[Title of estate and guardianship.]<sup>1</sup>

{ No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

It satisfactorily appearing to this court from the petition this day presented and filed by —, the guardian of the person and estate of —, an insane person, praying for an order of sale of certain real estate belonging to his said ward, that it would be beneficial to said ward and his estate that such real estate shall be sold, and the moneys applied toward the construction of dwellings on the real estate belonging to said ward, —

It is hereby ordered, That the next of kin of the said

ward, and all persons interested in the said estate, appear before this court on —, <sup>3</sup> the — day of —, 19—, at — o'clock in the forenoon, <sup>4</sup> at the court-room of this court, at the court-house <sup>5</sup> in the county <sup>6</sup> of —, then and there to show cause why an order should not be granted for the sale of such estate, at public or private sale.

And it is further ordered, That a copy of this order be published at least once a week for three consecutive weeks before the said day of hearing, <sup>7</sup> in —, a newspaper printed and published in said county <sup>8</sup> of —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 As, In the Matter of the Estate and Guardianship of —, an Insane Person. 2 Give file number. 3 Day of week. 4 Or, afternoon. 5 Designate location of court-house. 6 Or, city and county. 7 Or as directed by the court. 8 Or, city and county.

**§ 172. Form. Order to show cause why order of sale of incompetent's real estate should not be granted.**

[Title of court.]

[Title of estate and guardianship.]<sup>1</sup> { No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

It satisfactorily appearing from the verified petition of —, the guardian of the person and estate of —, also known as —, an incompetent person, that it would be beneficial and expedient that the real estate belonging to the said incompetent should be sold, —

It is therefore ordered, That the next of kin of said incompetent, and all persons interested in the said estate, appear before this court on the — day of —, 19—, at the hour of — in the forenoon <sup>3</sup> of said day, to show cause, if any they can, why such sale should not be ordered.

It is further ordered, That a copy of this order be published at least once a week for three successive weeks

before said day of hearing, in —, a newspaper printed and published in said county <sup>4</sup> of —, state of —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> As, In the Matter of the Estate and Guardianship of —, also known as —, an Incompetent Person. <sup>2</sup> Give file number. <sup>3</sup> Or, afternoon. <sup>4</sup> Or, city and county.

**§ 173. Form. Order directing payment of monthly allowance for support of feeble-minded.**

[Title of court.]

[Title of matter.]<sup>1</sup>

{ No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

—, a feeble-minded person, a resident of — county, state of —, having been committed to the — <sup>4</sup> by an order duly given and made by me as judge of the — <sup>5</sup> court of the county <sup>6</sup> of —, state of —, on this — day of —, 19—, under and pursuant to the terms of an act of the legislature of the state of —, entitled —,<sup>7</sup>

It is ordered, That the county <sup>8</sup> of — pay to the state treasurer, on account of and for the support of said person, monthly, the sum of ten dollars (\$10) for each month and part of a month that said person shall be and remain an inmate of said institution.

Dated —, 19—.

—, Judge of the — <sup>9</sup> Court of the — County <sup>10</sup> of —, State of —.

Explanatory notes.—<sup>1</sup> As, In the Matter of —, a Feeble-Minded Person. <sup>2</sup> Give file number. <sup>3</sup> Or, city and county. <sup>4</sup> Name the institution; as, California Home for the Care and Training of Feeble-Minded Children. <sup>5</sup> Title of court. <sup>6</sup> Or, city and county. <sup>7</sup> Give title of act and date of approval. <sup>8</sup> Or, city and county. <sup>9</sup> Title of court. <sup>10</sup> Or, city and county.

**§ 174. Proceeding for restoration to capacity.**

Any person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the superior court of the county in which he

was declared insane, to have the fact of his restoration capacity judicially determined. The petition must be verified, and must state that such person is then sane or competent.

**PROCEDURE.**—Upon receiving the petition, the court must appoint a day for a hearing before the court, and, if the petitioner requests it, must order an investigation before a jury, which must be summoned and impaneled in the same manner as juries in civil actions. The court must cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there is a guardian, and to his or her husband or wife, if there is one, and to his or her father or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person, may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court on its own motion. If it is found that the person is of sound mind, and capable of taking care of himself and his property, his restoration to capacity must be adjudged, and the guardianship of such person, if such person is not a minor, must cease.—*Kerr's Cyc. Code Civ. Proc.*, § 1766.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona—Revised Statutes of 1913, paragraph 1135.
- Idaho—Compiled Statutes of 1919, section 7859.
- Kansas—General Statutes of 1915, sections 6123, 6124.
- Montana\*—Revised Codes of 1907, section 7767.
- North Dakota—Compiled Laws of 1913, section 8889.
- Oklahoma—Revised Laws of 1910, section 6541.
- South Dakota—Compiled Laws of 1913, section 5999.
- Utah—Compiled Laws of 1907, section 4002.
- Wyoming—Compiled Statutes of 1910, sections 478, 479.



**§ 175. Form. Petition for judgment of restoration to capacity.**

[Title of court.]

[Title of matter.]<sup>1</sup>{ No. ——. <sup>2</sup> Dept. No. ——.   
 [Title of form.]

To the Honorable the — Court of the County <sup>3</sup> of —, State of —.

Now comes —, and alleges, That he is —,<sup>4</sup> and shows to this court that on the — day of —, 19—, such proceedings were had before this court that —<sup>5</sup> was duly declared to be insane, and that — was appointed guardian of the person and estate of said —;<sup>6</sup>

But your petitioner avers that the said — is now sane and competent; that he seeks to have the fact of his restoration to capacity judicially determined; and that he is entitled to have the question of his sanity or insanity determined by a jury.

Your petitioner therefore requests that this court order an investigation, before a jury, into the mental condition of the said —, to the end that he may be restored to capacity.

—, Petitioner.

—, Attorney for Petitioner.

[Add ordinary verification.]

**Explanatory notes.**—<sup>1</sup> As, In the Matter of —, an Alleged Insane or Incompetent Person. <sup>2</sup> Give file number. <sup>3</sup> Or, City and County. <sup>4</sup> The alleged insane or incompetent person, guardian, or relative of such person within the third degree, or a friend. <sup>5</sup> Name of alleged insane or incompetent person. <sup>6</sup> Section 1766 of the Code of Civil Procedure of California does not apply to persons committed to insane asylums, and for whom no guardian has been appointed.—Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104. For act to provide for restoration to capacity of persons adjudged to be insane, who have no guardians, and who are not confined at state hospitals for the insane, see Henning's General Laws, p. 533.

**§ 176. Form. Judgment of restoration to capacity.**

[Title of court.]

[Title of matter.]<sup>1</sup>{ No. ——. <sup>2</sup> Dept. No. ——.   
 [Title of form.]

It being shown that such proceedings were had in this court <sup>3</sup> on the — day of —, 19—, that — was de-

clared to be insane, and that a guardian was appointed for his person and estate; and a petition having been filed herein, alleging that said — is now sane and competent, and praying that a judgment be rendered restoring the said — to capacity; and such proceedings having been had herein that a jury was, on the — day of —, 19—, duly impaneled to determine the sanity and capacity of said —; and said jury, after hearing the evidence, having returned a verdict herein to the effect that said — is now of sound mind, and fully capable of caring for himself and managing his property; —

It is therefore ordered, adjudged, and decreed, That the said — be, and he is hereby, restored to capacity.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> As, In the Matter of —, an Alleged Insane or Incompetent Person. <sup>2</sup> Give file number. <sup>3</sup> Or, before a judge thereof.

#### § 177. Definition of "incompetent."

The phrase "incompetent," "mentally incompetent," and "incapable," as used in this chapter, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.—*Kerr's Cyc. Code Civ. Proc.*, § 1767.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1749.
- Arizona\*—Revised Statutes of 1913, paragraph 1136.
- Colorado—Laws of 1915, chapter 118, page 336.
- Hawaii—Revised Laws of 1915, section 3023.
- Oregon—Lord's Oregon Laws, section 1342.
- Utah\*—Compiled Laws of 1907, section 4001.
- Wyoming—Compiled Statutes of 1910, section 480.

**§ 177.<sup>1</sup> Procedure for admission of incompetents, other than insane persons, into the home for feeble-minded.**

Whenever any parent, guardian, or other person charged with the support of an imbecile or feeble-minded person, or any idiot, or epileptic who is not insane, desires him to be admitted into the home for feeble-minded, he may petition the superior court of the county in which he resides, for an order admitting such person to such hospital; provided, that any peace officer may petition said court for an order admitting such a person to such hospital. The judge must inquire into the condition or status of such person, and if he finds him to be an imbecile, feeble-minded person, idiot, or epileptic, and that he has been a resident of the state for one year next preceding the presentation of the petition, such judge must make an order that he be received, maintained, and educated in such hospital, and on the presentation of such order the superintendent must receive him therein, if the hospital is not already full, or the fund available for its support exhausted; but the imbecile, feeble-minded person, idiot, or epileptic, need not be received if, in the judgment of the management of the hospital or the commission, he is not a suitable subject for admission thereto.

**FINANCIAL CONDITION OF PARENT.**—The judge must inquire into the financial condition of the parent, guardian, or other person charged with the support of any such person, and if he finds him able, in whole or in part, to pay his expenses at such hospital, he must make a further order requiring such parent, guardian, or other person charged with the support of such person to pay to the hospital at stated periods such sums as, in the opinion of the judge, are proper during such time as the person may remain in such hospital. This order may be enforced by such further orders as the judge deems necessary, and may be varied, altered, or revoked in his discretion, and the board of managers may, with the approval of the

commission, cause the peremptory discharge of any person who has been an inmate or patient for the period of one month. For each child or other person committed to such home there shall be paid by the county from which he is committed to the state treasury the sum of ten dollars monthly for and during each month, or part of month, such person so committed remains an inmate of the hospital, in case the payments herein provided to be made by the parent, guardian, or other person charged with the support of any such person shall not be made.—*Kerr's Cyc. Pol. Code*, § 2192.

## GUARDIANSHIP OF INSANE PERSONS AND OTHER INCOMPETENTS.

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  - (1) Contracts and wills.
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  - (1) Restoration to capacity.
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12. Proceedings against insane persons.
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- (1) Right to appeal.
- (2) Notice of appeal.
- (3) Stay of proceedings.
- (4) Power of guardian pending appeal.
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**(6) Dismissal of appeal.**

- (7) Supplement to transcript.
- (8) Review in general.
- (9) Review of discretion.
- (10) Review of evidence.
- (11) Review of findings.

**1. Sanity and disability.**

(1) *In general.*—If a person arraigned for a crime is capable of understanding the nature and objects of the proceedings against him; if he rightly comprehends his own condition in reference to such proceedings; and can conduct his defense in a rational manner,—he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound.—*In re Buchanan*, 129 Cal. 330, 50 L. R. A. 378, 61 Pac. 1120. Sanity frequently exists before a judicial determination of that fact has been had. An adjudication of insanity overcomes the presumption that the party is sane; but it does not follow that because there is no adjudication there is no insanity. A legal disability may rest upon a person of unsound mind, although the question of his insanity may never have been the subject of judicial inquiry. Thus where a district court has found that a person was incapable of managing his own affairs, and that he was of unsound mind at the time of the rendition of a judgment, such person is under disability, within the meaning of the statute of limitations, although the question of his sanity has never been adjudicated by the probate court.—*Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745, 747. Under a statute which says, in effect, that if any person is so distracted in mind as to render him incapable of safely and properly managing his estate, and a jury shall so find, a conservator shall be appointed, absolute insanity is not the only test. The main object of such a statute is the protection of the property of those mentally afflicted. Inquiry must be made as to the extent of such mental infirmity. If it exists in such a degree, and is of such character, that the person so afflicted is, for that reason, unable to act intelligently with respect to his business affairs, or is affected with that imbecility of mind, not strictly insanity, but to such an extent that he is deprived of the mental power to act in a proper and provident manner in the management of his property interests, the statute is satisfied. On the other hand, although the mind may not be sound, if there be capacity to manage, as the result of consecutive reasoning, although the management might not be such as intellectual vigor and skill might approve, the party retaining the possession of his mental faculties to this extent would not come within the purview of such a statute.—*Shapter v. Pillar*, 28 Colo. 209, 63 Pac. 302, 303. The business of maintaining a private asylum for the treatment of mild forms of insanity, and of persons afflicted with inebriety and other

nervous diseases, is a lawful one, which can not be prohibited, either directly or indirectly.—*Ex parte Whitwell*, 98 Cal. 7, 3, 35 Am. St. Rep. 152, 19 L. R. A. 727, 32 Pac. 870, 874.

(2) *Incompetency*.—A person may be mentally incompetent, and yet not be a maniac, an idiot, nor an insane person.—*State (ex rel. Carroll) v. District Court*, 50 Mont. 428, 147 Pac. 612. Alleged fraudulent representations whereby a person has apparently been overreached in a land transaction may afford a cause of action against the guilty party, but the victim, is not, merely because of being overreached, open to be regarded as a lunatic and given over to a guardian.—*Fish v. Deaver*; *In re Fish's Guardianship (Okla.)*, 176 Pac. 250. The fact that a man 76 years of age desire to marry is not sufficient ground for the appointment of a guardian of his property.—*Hogan v. Leeper*, 37 Okla. 655, 47 L. R. A. (N. S.) 475, 133 Pac. 190. To justify appointment under the California Code of Civil Procedure, sections 1763, 1764, it must appear that an insane person's mind is so affected as to prevent comprehension of values and prudent management of property.—*In re Coburn*, 11 Cal. App. 604, 105 Pac. 924. Any person, who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons, is, in contemplation of section 6539, "incompetent," "mentally incompetent," and "incapable."—*Fish v. Deaver*; *In re Fish's Guardianship (Okla.)*, 176 Pac. 250, 253.

(3) *Evidence*.—The wilful failure of a father to maintain his child, although it may be shown as one of the items of evidence bearing upon the question of his competency, is not the same thing as incompetency, and will not support a conclusion to that effect.—*Matter of Forrester*, 162 Cal. 493, 123 Pac. 283. Generally one is presumed to be sane, and the burden is upon one asserting the contrary to prove it; but the appointment of a guardian for one alleged to be insane by a court having jurisdiction creates a presumption of insanity.—*Schindler v. Parzoo*, 52 Or. 452, 97 Pac. 757. If a person has been adjudged insane by courts in California, Massachusetts and New York successively, after which a New York court has adjudged him competent and restored to him his property, theretofore in the hands of a guardian, the latter adjudication raises a disputable presumption of sanity which may be overcome by evidence submitted to a jury.—*Estate of Baker*, 176 Cal. 430, 168 Pac. 881. Under the California Code of Civil Procedure, section 1870, subdivision 10, permitting opinion of acquaintance as to sanity of person, reason for opinion being given, person giving opinion must state reason on which it is based, and opinion has no weight other than that which reason brings to its support.—*In re Coburn*, 11 Cal. App. 604, 105 Pac. 924. It is error to permit witness to give opinion as to ability of person to manage his

property, and as to whether he is liable to be imposed upon by designing parties.—*In re Coburn*, 11 Cal. App. 604, 105 Pac. 924.

(4) **Statutory provisions.**—The purpose of the act of congress of January 27, 1905, was to provide a method for the trial of those persons who are alleged to be insane, and to authorize the confinement of such persons in an asylum or sanitarium for the cure of insanity.—*White's Guardian v. Martin*, 2 Alaska 471, 474. The statutory provision, found in Gen. St. 1915, §§ 6128-6130, for the reimbursement of the state or county for the expense of caring for persons adjudged to be insane, has no application to the case where a person charged with being insane has been judicially determined not so.—*In re Erickson*, 104 Kan. 521, 180 Pac. 263. The Revised Laws, § 6538 et seq., relating to mental incompetents and the guardianship of their persons and estates, have no application to a case where the testimony fails to show the party under inquiry to be essentially deprived of reasoning faculties, to have an incapacity of understanding and an absence of discretion in transacting the ordinary affairs of life. Occasional misadventures are incident to the careers of the best business men.—*Fish v. Deaver*; *In re Fish's Guardianship* (Okla.), 176 Pac. 251. Under the federal statute relative to the property of deceased and of orphan, minor, insane, or other incompetent allottees of the Osage Tribe of Indians, the question of "incompetency" is to be determined by the laws of the state of Oklahoma; minority is not "incompetency" within the meaning of that statute; it is merely a disability.—*Williams v. Hewitt* (Okla.), 181 Pac. 286.

## 2. Jurisdiction of courts.

(1) **In general.**—In order that a court may have jurisdiction of a proceeding to subject the person and estate of an alleged lunatic to guardianship, it needs only that the plaintiff have his complaint allege, substantially in the words of the statute, that the individual intended is insane or is incapable of conducting his own affairs.—*Dickenson v. Henderson*, 90 Or. 408, 176 Pac. 797. In a proceeding to appoint a guardian for an alleged incompetent person, the adversary parties are the petitioner and the alleged incompetent.—*In re Murphy's Estate*, 43 Mont. 353, 375, Ann. Cas. 1912C, 380, 116 Pac. 1004. In a proceeding for the appointment of a guardian for a person alleged to be incompetent an order of court, reciting that it appears that such person is incompetent and that he has property in the county, is a sufficient finding of the ultimate fact.—*Estate of Schulmeyer*, 171 Cal. 340, 153 Pac. 233. Section 912, Alaska Code, applies only to the appointment of guardians of persons who reside without the district, having estates within the district where the proceedings are instituted.—*Martin v. White* (Alaska), 146 Fed. 461, 76 C. C. A. 671, 674.

(2) **Probate courts.**—Except as limited by the statutes, probate courts, in Kansas, have the same power over the person and estate of lunatics as that formerly possessed by courts of chancery under the

common law.—*Foran v. Healy*, 73 Kan. 633, 86 Pac. 470. A probate court of Kansas has control of the guardian of an insane person in respect to both the managing of the estate and the settlement of the accounts of the ward, and on the death of the ward the guardian must make a final settlement of the accounts in the court.—*Martin v. Duckworth*, 96 Kan. 717, 153 Pac. 505. The probate court has jurisdiction to appoint successive guardians for an insane person, in case of resignations, without notice to such person being first given.—*Johnson v. Gustafson*, 96 Kan. 630, 152 Pac. 621. A probate court may, without notice, appoint a successor to a guardian for a lunatic, who has been duly adjudged to be a person of unsound mind, confined in the state hospital, and discharged therefrom as improved.—*Ekblad v. Linderholm*, 102 Kan. 3, 169 Pac. 555. Pending the action of the probate court of Kansas upon the presentation by the guardian of a deceased lunatic of his final account for approval, it is not for the district court to intervene and exercise its general jurisdiction to investigate accounts, find balances, ascertain and declare defaults, and enforce securities for unfaithful conduct.—*Martin v. Duckworth*, 96 Kan. 717, 153 Pac. 505. By the congressional act of June 6, 1900, a probate court of Alaska was empowered to appoint a guardian for the persons and estates of insane persons; the subsequent act of January 27, 1905, providing for a jury trial and the confinement of persons found to be insane, had no relation to that court's jurisdiction to appoint a guardian for the person and estate of insane persons.—*White's Guardian v. Martin*, 2 Alaska 471, 474. Considering the county court, when acting as a probate court, as a court of general jurisdiction in respect to the matters exclusively committed to it by statute, including the appointment of a guardian for an insane or incompetent person, its jurisdiction will be presumed against collateral attack, until a state of facts inconsistent with such presumption is affirmatively shown. While such presumption will not prevail against contrary facts shown by the record, yet it is efficient to supply defects or omissions.—*Matson v. Swenson*, 5 S. D. 191, 58 N. W. 570. The jurisdiction to appoint a guardian over the person and the estate of a lunatic belongs exclusively to the probate court of the county wherein such lunatic has a permanent residence. The jurisdiction conferred by statute upon other probate courts to inquire into and adjudicate upon the sanity of persons in the county is intended as a police regulation, and such jurisdiction ends with the adjudication and commitment or discharge of such person.—*Foran v. Healy*, 73 Kan. 633, 85 Pac. 751. The power of the probate court to appoint a guardian for an insane person, under the statute, is not defeated or taken away by the fact that such insane person is a married person. And in case the insane person be the wife, there is no rule of law which prefers the husband as such guardian, or forbids the court to appoint another person to be the guardian, if, in its opinion, the husband is not a fit person to discharge the duties of guardianship.—*Guardianship of Fegan*, 45 Cal.



176, 177. When the proper petition is filed, and the appointment of a guardian of the person and estate of one who is alleged to be insane has been filed, and the required statutory notice given, the probate court acquires jurisdiction to adjudicate the question of insanity, and to select a guardian, whether that person be the one named in the petition or another.—*Halett v. Patrick*, 49 Cal. 590. In such a proceeding, if the petitioner is appointed, but fails to give the required bond, the court may, in the same proceeding, appoint another person as guardian without a new notice. It is sufficient that notice was given of the original application.—*Halett v. Patrick*, 49 Cal. 590, 595.

(3) *County courts.*—A county court of Oregon is empowered to appoint guardians to take care, custody, and management of the estates of all insane persons, "and all who are incapable of conducting their own affairs."—*In re Sneddon*, 76 Or. 470, 149 Pac. 527. The county courts of Oklahoma have jurisdiction to appoint guardians for the persons and estates of incompetent full-blood Creek Indians.—*Yarhola v. Strough* (Okla.), 166 Pac. 729, 730; *Severs v. Strough* (Okla.), 166 Pac. 730. A county court of Oklahoma has jurisdiction to approve a lease of oil and gas properties of an insane person, made by the person's guardian, and its order so approving, cures defects in the petition therefor.—*Hoyt v. Fixico* (Okla.), 175 Pac. 517. It was intended, by the act of congress of April 18, 1912, 37 Stat. 86, ch. 83, to confer jurisdiction on the county court of Osage county over the estates of allottee minor Indians, where such allottee is a minor orphan, and over the property of deceased, insane, or other incompetent allottees of the Osage Tribe of Indians; minority is not incompetency within the meaning of that act, which act is supplementary to and amendatory of the Allotment Act, but is merely a disability.—*Williams v. Hewitt* (Okla.), 181 Pac. 286, 288.

(4) *Superior courts.*—The superior court has more than probate jurisdiction, in matters concerning the settlement of a guardian of an incompetent person; it has all the powers of a court of equity, and, where a guardian, for such a person, was appointed upon his own petition, it amounts to a voluntary submission to the court's jurisdiction, and the court may require the guardian to account for all sums received by him, prior to the guardianship, as well as for all received thereafter; it may also compel him to cancel a note that is fraudulent and void as against the ward.—*In re Williamson*, 75 Wash. 353, 359, 134 Pac. 1066. The superior court of California sitting in probate has no jurisdiction to hear and determine a disputed claim against the guardian of an insane person or his estate. Hence an order requiring such guardian to pay money out of the estate to the state hospital for the care of the insane ward therein is beyond the jurisdiction of the court.—*Guardianship of Breslin*, 135 Cal. 21, 22, 66 Pac. 962. Under its constitutional and statutory powers the superior court of the state of Washington has power to appoint a non-resident the guardian of such of the estate of an incompetent non-resident as is within the state of

Washington.—In *re* Sall, 59 Wash. 539, 110 Pac. 33, 140 Am. St. Rep. 885. The superior courts of the state of Washington have jurisdiction to appoint a non-resident as guardian of an incompetent, to protect such property rights as the incompetent has within the state, even though the appointment is applied for when it is not known where the incompetent is; a fortiori they have jurisdiction to appoint a resident as such guardian, and when the incompetent is actually present in court.—In *re* Stewart; *Heffernan v. Butler*, 85 Wash. 190, 147 Pac. 1153. The superior courts of the state of Washington have an inherent jurisdiction to protect the estate of non-resident incompetent persons; and while it is generally said that the power to appoint guardians is purely statutory, the power in fact lies in the sovereignty of the state, and the procedure only is statutory.—In *re* Sall, 59 Wash. 539, 110 Pac. 33, 140 Am. St. Rep. 885.

### 3. Appointment of general guardian.

(1) *Petition for. Authority of court.*—A guardian may be appointed for any one who, through drunkenness or other cause, has become incapable of managing his affairs. The word "insane," in statutes on this subject, is intended to cover every person for whom a guardian might be appointed under the provisions of the statute, and includes idiotic persons, as well as all who are incapable of managing their own affairs by reason of any unsoundness of mind, due to whatever cause. The intent of the law is to include all such persons, to the end that all may be properly cared for, and that their estates may not be squandered, and such persons thus be made to become a public charge.—In *re* Wetmore, 6 Wash. 271, 33 Pac. 615, 617. But the clerk of a court, having no judicial power, is not authorized, in vacation, to adjudge a person insane, and to appoint a guardian for him.—*Appeal of Kane*, 12 Mont. 197, 29 Pac. 424. Even a probate court is without authority to appoint a guardian of the person and the estate of an adult, unless such person has been duly adjudged to be an idiot, a person of unsound mind, or an habitual drunkard, and incapable of managing his or her affairs. There can be no guardianship, except for infants, lunatics, and others under legal disabilities. The probate court has no authority to give one person the control of the person and estate of another, unless it is specifically conferred by law.—*Martin v. Stewart*, 67 Kan. 424, 73 Pac. 107, 108. When an application is made for the appointment of a guardian for a person who is alleged to be mentally incompetent, and the statute requires that the court must cause a notice to be given to such incompetent, the verified petition should set forth his residence, in order that such notice may be given.—*Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005, 1006. Where the residence of the incompetent is set forth in such petition, and it appears that such incompetent is a non-resident, there is no necessity to file an affidavit of non-residence.—*Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005, 1006. Where the statute provides

that a guardian may be appointed for an alleged insane person on the verified petition of a relative or friend, a petition is sufficient, where it alleges that petitioner is a citizen, and a resident of a certain county, and was the agent and friend of such insane person before she was adjudged insane, and that petitioner has been requested by the sons of the incompetent, and by the person who has charge of the incompetent's affairs, to petition to be appointed guardian of the incompetent's estate within the state.—*Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005, 1006. Under the provisions of sections 1764 and 1765 of the Code of Civil Procedure of California, the guardian of an insane ward is charged with the care and custody of the person of his ward, as well as the control and management of his estate; it would seem, therefore, that the court is not authorized to appoint a guardian of his estate only, and not of his person; and that the order of the court can be made effective only by the appointment of a guardian of both the person and the estate of the ward. The superior court has jurisdiction to appoint guardians for insane persons, wholly independently of its jurisdiction to commit to hospitals for the insane, and the validity of the order appointing a guardian depends in no manner upon the validity of the previous adjudication of insanity, where no fraud or conspiracy is charged. Hence, in an action which involves the validity of an order for defendant's guardian to sell his land, it is improper to consider the previous adjudication of insanity.—*Donaldson v. Winningham*, 48 Wash. 374, 125 Am. St. Rep. 937, 93 Pac. 534, 535. Where the hearing of a petition for the appointment of a guardian for an incompetent person is adjourned to a day certain, the court has no power to hear it on an earlier day.—*McGee v. Hayes*, 127 Cal. 336, 78 Am. St. Rep. 57, 59 Pac. 767. An allegation in a petition for the appointment of a guardian of an incompetent person to the effect that he "is unable, unassisted to properly manage and take care of his said property and by reason thereof is likely to be deceived and imposed upon by artful and designing persons and is mentally incompetent to manage his said estate; that he is by reason of old age and physical disability and weakness of mind, unable to take care of himself and manage his property," together with findings that he is "unable to properly manage or take care of himself and his property," are sufficient to justify the appointment of a guardian.—*Guardianship of Coburn*, 165 Cal. 202, 131 Pac. 352. Where a petition for the guardianship of an alleged incompetent and the findings contain everything necessary to justify the appointment, it is not material whether section 1767 of the Code of Civil Procedure of California defining an incompetent person is constitutional.—*In re Coburn*, 165 Cal. 202, 131 Pac. 352. While, in considering the sufficiency of the petition and findings in proceedings for the appointment of a guardian of an incompetent, it is not necessary to rely upon section 1767 of the Code of Civil Procedure of California, still a decision upon the validity of that section is proper and useful

as a means toward ascertaining what, under the law, constitutes incompetency sufficient to authorize the appointment of a guardian.—*In re Coburn*, 165 Cal. 202, 131 Pac. 352. The California statute defining mental incompetency is a valid enactment, and there is no occasion to go beyond its terms to learn what condition will justify the appointment of a guardian.—*In re Coburn*, 165 Cal. 202, 131 Pac. 352. The inability defined by statute means a mental rather than a physical inability, and it is immaterial how such inability has been produced. It may have resulted from old age, disease, or any other cause.—*In re Coburn*, 165 Cal. 202, 131 Pac. 352. A court may select any proper person to act as a guardian for an incompetent, even a stranger. It need not appoint his wife.—*In re Coburn*, 165 Cal. 202, 131 Pac. 352. In appointing a guardian for an incompetent, a court is not required to give any weight to his preference.—*In re Coburn*, 165 Cal. 202, 131 Pac. 352. A woman, 81 years old, though somewhat feeble physically, absent minded, and forgetful, should not have her person and property placed under guardianship on the petition of one child merely because otherwise another child may possibly influence her in his own favor.—*Dickenson v. Henderson*, 90 Or. 408, 176 Pac. 797. To satisfy the statute whereby, in proceedings for the appointment of a guardian of an incompetent, the petition may be made by "any relative or friend," it is not necessary for the court to inquire into whether the person petitioning as a friend is such within the full meaning of the term, provided he seems to have an interest sufficient to justify his making the application.—*Estate of Schulmeyer*, 171 Cal. 340, 153 Pac. 233. Under the statutes, it is proper to appoint a guardian for a person alleged to be incompetent when it appears that such person is for any reason mentally unable, unassisted, properly to manage and to take care of himself or of his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.—*Estate of Schulmeyer*, 171 Cal. 340, 153 Pac. 233. The proceedings for the appointment of a guardian for an insane person are not controlled by the statute regulating the proceedings for appointing a guardian for a minor, but by one specifically directed to the purpose.—*In re Espinosa's Estate and Guardianship*, — Cal. —; 175 Pac. 896. The matter of the appointment of a guardian for the person and estate of an insane person is peculiarly within the equitable jurisdiction of the probate court; it is a proceeding for his benefit and for the protection of his estate.—*White's Guardian v. Martin*, 2 Alaska 471, 475.

## REFERENCES.

A corporation may act as executor or guardian. See *Henning's General Laws of California*, page 169.

(2) Notice and personal presence.—In the absence of statutory requirements, no notice is necessary to confer authority upon a probate court to appoint a guardian, either for a minor, or a lunatic who has been adjudged to be a person of unsound mind.—*Foran v. Healy*,

73 Kan. 633, 86 Pac. 470. The appointment of a guardian for a person who has been adjudged insane by the county court is valid, though not made upon a verified petition and on notice to such person.—*Sprigg v. Stump*, 7 Saw. 280, 8 Fed. 207. In a proceeding for the appointment of a guardian for an incompetent person, it is not sufficient that the alleged incompetent is merely cited to appear, but he must be actually present, in order to give the court jurisdiction, where process has been served upon him, unless some reason is shown for his failure to be present at the time.—*In re Wetmore*, 6 Wash. 271, 33 Pac. 615. Under the statute of Washington, the service of notice of the application for the appointment of a guardian for a person alleged to be insane, and upon a person having the care, custody, and control of such insane person, is jurisdictional, and if no such notice was served, all subsequent proceedings are null and void.—*Donaldson v. Winningham*, 48 Wash. 374, 125 Am. St. Rep. 937, 93 Pac. 534, 535. Where the statute provides that notice of application for the appointment of a guardian for an incompetent person must be served on such incompetent person, and on the person having the care, custody, and control of such incompetent person, and that the person for whom a guardian is sought must be present at the hearing, if able to attend, the former of these requirements, at least, is jurisdictional. A proceeding for the appointment of a guardian is statutory, and the requirement that notice shall be given is mandatory. Ordinarily, the notice to be served on the incompetent person is of far less importance than the notice required to be served on the person having the care, custody, and control. The incompetent person may be so far bereft of reason that the notice served on him is little more than a formality; whereas the law presumes that those having the care, custody, and control of such person have at least sufficient interest in his welfare to see that his legal rights are protected. The record should therefore show that the required notice was served, or that there was no person upon whom service could be made, and that the person for whom the guardian is sought was present at the hearing or was unable to attend.—*State v. Superior Court*, 41 Wash. 450, 83 Pac. 726, 727. No one can be deprived of his personal rights, and of his right to property, by an adjudication that he is insane, and the appointment of a guardian for his person and property, unless he has had reasonable notice of the proceedings and an opportunity to be heard.—*Estate of Brash*, 15 Haw. 372, 375. Service of notice of an application to appoint a guardian for an insane person is sufficient when made upon him and the person having him in charge at an asylum.—*Donaldson v. Winningham*, 62 Wash. 212, 113 Pac. 286. The court has no jurisdiction to appoint a guardian ad litem for an incompetent defendant until he has been brought into court by personal service of summons.—*State v. District Court*, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (N. S.) 1098, 99 Pac. 293. The notice to the incompetent required by section 1563 of the California Code of Civil Procedure

applies only to an original appointment of a guardian thereunder, and has no application to a petition to remove a guardian under section 1801 of that code, which empowers the court to appoint another person in the place of the removed guardian, and provides for no notice to the incompetent person.—Guardianship of Tilton, 15 Cal. App. 244, 114 Pac. 594. Where, by the order of the court, the incompetent was present at the hearing, the court was justified in questioning her to ascertain her mental condition, and was justified, if he found her mentally capable of aiding his judgment, to act according to her wishes to have the petitioner appointed as guardian, though presumptively the court acted on its judgment in making such appointment, and did not make it merely on the nomination and request of the incompetent alone.—Guardianship of Tilton, 15 Cal. App. 244, 114 Pac. 594. Section 896, Alaska Code, providing for notice of the appointment of a guardian for an insane or incompetent person, contemplates personal notice, and public notice of the time and place of the hearing given by publishing in a newspaper and by posting in three public places is not the notice the statute requires.—Martin v. White (Alaska), 146 Fed. 461, 76 C. C. A. 671, 675.

(3) *Validity of notice.*—Where the statute requires the personal presence of the incompetent, if it can be had, as well as that notice of the hearing of the petition be given him, notice must be given to such person of the time and place of the hearing, but the personal presence of such person on the hearing, and his request that the petition be granted, do not cure fatal defects in the notice of the hearing served on him. A copy of an order made on the filing of the petition fixing a certain day "as the time for the hearing," without specifying the hour or place, and directing the notice to be given of the time and place of the hearing, is not a sufficient notice of the hearing.—McGee v. Hayes, 127 Cal. 336, 78 Am. St. Rep. 57, 59 Pac. 767. Under the statute of South Dakota, a notice purporting to issue from the court under its seal, and signed by the clerk, is a good notice, whether proceeding from the judge or from the court, where the powers conferred upon the probate judge in relation to guardians and wards may be exercised by him at chambers, or as the act of the probate court.—Matson v. Swenson, 5 S. D. 191, 58 N. W. 570. Where the court is required by statute, before appointing a guardian of an insane person, to give notice to all persons interested, in such manner as the court shall order, by publication or otherwise, the court must specify the notice in its order, and require it to be given by publication in a newspaper, by posting, or by personal service, and state therein whether it shall be published in a newspaper or be posted, or both, or whether personal service shall be made; and, in either case, to state how long, and, if by posting, where, and in how many places. An order of the probate court which merely names the time and place for the hearing of an application for the appointment of a guardian, and then directs the clerk to cause publication thereof to be given, "as prescribed by law," that all per-

sons interested may appear and oppose the petition, is fatally defective, because it simply directs the clerk to cause notice thereof to be given "as prescribed by law." The court is not authorized to intrust to the clerk what would be due notice "as prescribed by law"; the clerk's notice in pursuance of such order is of no effect; and the order appointing a guardian upon such notice is void.—*Mosby v. Gisborn*, 17 Utah 257, 54 Pac. 121, 127. A citation to an incompetent to attend the hearing, on motion to have a guardian of his person and estate appointed, satisfies, as to form, the statute appropriate to the proceeding, if it designates the time and place for the person named therein to appear and show cause why the proposed person or some other fit one should not be appointed guardian according to the petition on file.—*In re Espinosa's Estate and Guardianship*, — Cal. —; 175 Pac. 896. In counting the five days, in respect to the citation required, by the California Code of Civil Procedure, to be served upon an alleged incompetent, preliminary to the appointment of a guardian of his person and estate, it is not necessary to exclude the days both of the service and the hearing.—*In re Espinosa's Estate and Guardianship*, — Cal. —; 175 Pac. 896.

#### REFERENCES.

Lunacy proceedings; necessity of notice.—See note 23 L. R. A. 737-744.

(4) Notice by publication.—Under a statute providing that when an incompetent, having property in this state for whom a guardian is sought to be appointed, resides out of the state, the service of notice shall be against the insane person by publication, the only notice required where the incompetent is a non-resident is the notice by publication.—*Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005, 1006.

(5) Objections to appointment.—The holder of an oil and gas lease, by assignment from the lessee of an insane person, can not object to the appointment of a guardian for the person and estate of the lessor, inasmuch as the proceedings have relation to the condition of the person at the time thereof and not previously.—*In re Fixico (Okla.)*, 175 Pac. 516.

(6) Evidence and jury trial.—One petitioning for the appointment of a guardian of another's person and estate must offer satisfactory proof of incompetency on the part of such other individual.—*Dickenson v. Henderson*, 90 Or. 408, 176 Pac. 797. In order to justify the appointment of a guardian of an alleged incompetent person, under the provisions of sections 1763 and 1764 of the California Code of Civil Procedure, the court must find the person for whom the guardian is appointed mentally incompetent to take care of himself and to manage his property. The evidence must show that his mind is so far gone, and so weak and feeble, that he does not realize and comprehend the value and prudent management of his property, and is not sufficiently normal to care for it in the usual acceptation of that term.—Guardian-

ship of Coburn, 11 Cal. App. 604, 105 Pac. 924. It is not necessary, in order to warrant the appointment of a guardian of a person mentally incapable of taking care of his property, that he should also be unable to take care of his person.—In re Coburn, 165 Cal. 202, 131 Pac. 352. To make out a proper case for appointing a guardian for the estate of a person alleged to be of unsound mind, it is not necessary to show that such person is an idiot or lunatic, in the strict sense of those terms, but only that by reason of a lack of mental balance he is unable to manage his business affairs.—In re Guardianship of Bayer's Estate, 101 Wash. 694, 172 Pac. 842. On a petition by a stranger that a guardian be appointed of the estate of an insane person incarcerated in the state asylum and suggesting a third person as fit and proper for the office, a brother of the insane contested the petition and suggested himself for guardian if one was to be appointed, the evidence showed that there had been a misappropriation of some part of the insane's property and that it was not likely to be returned if the brother were appointed, the original nominee was appointed in preference to the brother.—In re Martenson, 77 Wash. 36, 137 Pac. 340. A non-expert witness may, in proceedings for the appointment of a guardian for an incompetent person, testify to having noticed such person's "inability to take care of himself," provided the witness goes on to state the facts that served as notice.—Estate of Schulmeyer, 171 Cal. 340, 153 Pac. 233. In proceedings for the appointment of a guardian for an alleged incompetent, the petitioner may be asked on cross-examination how much money he has spent in the proceedings.—In re Coburn, 165 Cal. 202, 131 Pac. 352. On an application for the appointment of a guardian, the alleged incompetent may himself be called as a witness and examined.—In re Coburn, 165 Cal. 202, 131 Pac. 352. An application to reopen a guardianship case for the introduction of further evidence is addressed to the discretion of the court.—In re Coburn, 165 Cal. 202, 131 Pac. 352. The constitution does not guarantee the right of trial by jury in proceedings for the appointment of a guardian for an incompetent.—In re Coburn, 165 Cal. 202, 131 Pac. 352.

(7) Collateral attack.—In proceedings for the appointment of a guardian for an incompetent person, entertained and acted upon by the county court, resulting in such appointment, that appointment will not be held invalid on collateral attack because the written petition was formally addressed to the judge instead of to the court.—Matson v. Swenson, 5 S. D. 191, 58 N. W. 570. In a collateral attack by a stranger, it is not a fatal objection to the validity of the appointment of a guardian for an incompetent person that five days, as required by statute, did not intervene between the service of the notice and the hearing; and, in the absence of any showing to the contrary, it will be presumed that full statutory notice was waived.—Matson v. Swenson, 5 S. D. 191, 58 N. W. 570. Letters of guardianship of a lunatic, or an order appointing a guardian for one alleged to be incompetent to manage his affairs, issued by the probate court, can not be attacked



in a collateral proceeding, where issued by a court of competent jurisdiction.—*Warner v. Wilson*, 4 Cal. 310; *Isaacs v. Jones*, 121 Cal. 257, 53 Pac. 793, 794, 1101. But where the proceedings disclose all the steps taken to confer jurisdiction, from which it clearly appears on the face of the record that the court was without jurisdiction to make an order appointing a guardian for an incompetent person, such order can be collaterally attacked.—*McGee v. Hayes*, 127 Cal. 336, 78 Am. St. Rep. 57, 59 Pac. 767, 768.

#### REFERENCES.

Collateral attack on lunacy proceedings for want of notice to the lunatic.—See note 12 L. R. A. (N. S.) 895, 896.

(8) *Revocation of appointment*.—The petition is not required to set forth the next of kin, in order that the citation may be served upon them. The statute only contemplates the service of the citation under a petition to revoke letters of guardianship upon the guardian sought to be removed and does not contemplate service thereof upon the next of kin.—*Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594. The averment in the petition to revoke the letters of guardianship and to appoint petitioner as such guardian, as to the friendly relation of the petitioner to the incompetent, and also to her deceased husband for many years, is sufficient to set forth the qualification of the petitioner to appear as the friend of the alleged incompetent.—*Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594. In proceedings to revoke letters of guardianship, the petition is not subjected to the tests given to complaints in actions at law; but the petition is sufficient, where its statements fully inform the court as to why it should interfere for the protection of the incompetent, and authorized the court to inquire, from its averments, whether the guardian had abused her trust, or was guilty of continued failure to perform her duties, or had an interest adverse to the faithful performance of her duties, or was unsuitable to act, or had mismanaged or wasted the estate.—*Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594.

4. *Guardian ad litem*.—Where a person has an interest in the matter in litigation, and also an interest in the success of the defendant, the court is authorized to permit such person to become a party to the action; and if such party at the time is insane, he can appear only by a general guardian or a guardian ad litem, and the court is authorized to appoint a guardian ad litem for him before the filing of his complaint in intervention.—*Security Loan & Trust Co. v. Kaufman*, 108 Cal. 214, 41 Pac. 466, 469. An incompetent whether plaintiff or defendant must appear either by his general guardian, or, in case he has none or the guardian falls or refuses to appear, by a guardian ad litem appointed by the court upon the application of a friend or relative or by one of the parties to the action. In all cases where the incompetent is plaintiff the application should be by a relative or friend.—*State v. District*

Court, 38 Mont. 166, 129 Am. St. Rep. 636, 35 L. R. A. (N. S.) 1098, 99 Pac. 294.

5. Support, maintenance, and custody.—The property of an incompetent person may be used for his maintenance and the payment of his debts; and the guardian may be authorized to sell any part of the incompetent's real property for such purpose when the income of the estate under guardianship is insufficient to maintain his ward.—Guardianship of Hayden, 1 Cal. App. 75, 81 Pac. 668. Where the amounts allowed a guardian for board and lodging furnished and personal services rendered by him to the incompetent are sufficient, and even liberal, such allowance will not be increased, although there is uncontradicted testimony of witnesses that, in their opinions, a larger amount should be allowed. In these matters much must be left to the discretion of the court.—Estate of Averill, 6 Cal. Unrep. 774, 66 Pac. 14.

#### REFERENCES.

See note, "Commitment and discharge of insane persons," following section 214, post. Power of guardian to manage estate, maintain ward, and to sell real estate.—See ante, § 108.

#### 6. Powers, rights, duties, and liabilities of guardian.

(1) In general.—Neither the guardians nor the courts having jurisdiction over the estates of incompetent persons have power to bind the person or estate of such persons, unless expressly authorized to do so by law.—Andrus v. Blazzard, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888, 890. The guardian of an insane ward is not authorized to mortgage the real property of his ward for the purpose of paying debts, and the guardian who so acts binds himself, and not the ward.—Andrus v. Blazzard, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888, 891. A guardian is an officer of the court and subject to its directions.—In re Allard, 49 Mont. 219, 141 Pac. 663. A guardian or other trustee has no moral or legal right to mingle trust funds with his own private property, or to profit by the use of the funds belonging to the cestui que trust, and any trustee who attempts to do so should be summarily removed.—In re Allard, 49 Mont. 219, 141 Pac. 665. It is not within the discretion of the guardian of an insane person to ratify and affirm the validity of a mortgage given by his ward while insane, but he is bound at his peril to disaffirm and avoid it.—Bowman v. Wade, 54 Or. 347, 103 Pac. 76. An order appointing a guardian of the person and estate of an incompetent person is not separable, so that the guardian may be deprived of the custody of the person while continuing to exercise control of the estate.—State (ex rel. Carroll) v. District Court, 50 Mont. 428, 147 Pac. 612. In a case where a passenger elevator, in a building owned by an insane person, and operated for such person by a guardian of the person and estate, has fallen, by reason of the breaking of a rope, and injured a passenger, the latter can not make the guardian

liable unless his individual negligence is shown.—*Campbell v. Bradbury*, — Cal. —; 176 Pac. 685.

#### REFERENCES.

Power and authority of guardian of insane person.—See note 1 L. R. A. 270. Power of guardian or committee to bind incompetent person or his estate by contract.—See note 8 L. R. A. (N. S.) 436, 437. Powers and duties of guardian of minor.—See ante, § 84. Guardian of insane person or other incompetent may receive proceeds of sale, in partition proceedings, of such party's interest.—See post, § 168.1

(2) As to attorneys and their fees.—Although the statute makes provision for the allowance and payment of claims against the estate of an incompetent person by the guardian, such guardian, appointed for an incompetent, who was indebted to his attorney for fees at time of such appointment, has no power to pay such fees to the attorney out of the funds of the incompetent's estate before the attorney's claim has been allowed by the court.—*State v. District Court*, 30 Mont. 8, 75 Pac. 516. The appointment of a guardian for a client, who has become insane, and who, at the time of such insanity, is indebted to his attorney, who has charge of his interests, does not divest the attorney of any lien or security which he had at the time to secure payment of his fees.—*State v. District Court*, 30 Mont. 8, 75 Pac. 516, 517. Under a statute providing that an attorney in an action may be changed on the order of the court on the application of either client or attorney, after notice from one to the other, the guardian of an incompetent person is absolutely entitled to have a different attorney substituted to represent him, instead of the firm which had represented the incompetent before the guardian's appointment; and this right is not affected by the fact that the fees to such firm have not been paid.—*State v. District Court*, 30 Mont. 8, 75 Pac. 516, 517. An attorney employed by a guardian ad litem of a minor, to prosecute an action pending in the superior court on behalf of the minor, and whose fee for his services had never been fixed by the court having jurisdiction of the action, can not maintain a writ of review to annul the order of another department of the superior court, made in the guardianship proceedings of the estate of such minor, fixing his fee for such services.—*Lund v. Superior Court*, 159 Cal. 439, 114 Pac. 569. Employment of special counsel by a guardian to defend him in the matter of proceedings for his removal will not be allowed when his general counsel is fully able to handle the matter.—*In re Bayer*, 80 Wash. 340, 141 Pac. 683.

(3) Conduct of ward's business.—The custodian of an incompetent person should not allow the business affairs of his ward to be transacted by others, except under extraordinary circumstances. But, where such other persons are relatives, and conversant with the affairs of such incompetent, and the children and heirs at law of the ward request it, and no creditor appears to contest the act of the guardian, the guardian may be excused for this digression.—*Racouillat v. Requeña*, 36 Cal.

651, 656. If the guardian of an incompetent person lends money upon the sole credit of the borrower, the guardian must show that he acted in good faith, and with due circumspection and prudence. In the absence of such evidence, the presumption is otherwise.—*Estate of Averill*, 6 Cal. Unrep. 774, 66 Pac. 14. The rule that a guardian making a loan of his ward's funds must exercise due care will be applied much more strictly against a guardian who makes a loan on his own responsibility than where he makes a loan at the direction of the court.—*In re Allard*, 49 Mont. 219, 141 Pac. 663. A guardian must account for all accumulations from the use of the ward's funds and under no circumstances will he be permitted to profit from their use.—*In re Allard*, 49 Mont. 219, 141 Pac. 663.

(4) *Actions by guardian.*—A person competent to make a will has a right to select the custodian, and to cause it to remain in his hands until called for, or until death makes it necessary for the custodian to deliver it to the court, or to a person named in the will; and the guardian of a lunatic can not therefore maintain an action to recover his ward's will from the custody of a third person, where it was placed before the ward was declared insane.—*Mastick v. Superior Court*, 94 Cal. 347, 29 Pac. 869. The guardian of an insane woman can not maintain an action against her husband for divorce and alimony, or for alimony alone.—*Birdzell v. Birdzell*, 33 Kan. 433, 52 Am. Rep. 539, 6 Pac. 561; affirmed upon rehearing in same case, 35 Kan. 638, 11 Pac. 907. The complaint by the guardian of an incompetent ward will be held sufficient after judgment, and in the absence of demurrer, though the issuance of letters of guardianship to the guardian of the incompetent plaintiff are pleaded inferentially.—*Elizalde v. Elizalde*, 137 Cal. 634, 637, 66 Pac. 369, 70 Pac. 861. The finding of a jury, on an inquest, that the subject of the inquiry is feeble in mind, is incapable of managing his business affairs, and is a typical imbecile, is not a finding on insanity within the statutory meaning of that term, and furnishes the probate court no authority to appoint a guardian for such feeble-minded person, and consequently gives the guardian no right to maintain an action in his behalf.—*Caple v. Drew*, 70 Kan. 136, 78 Pac. 427. In ejectment by the guardian of an incompetent person to recover certain premises, the guardian's motives, and what he believed, and what he desired, are immaterial; and conversations between him and the defendant and his wife are inadmissible, as nothing which the guardian might say could deprive the ward of his property or of his rights.—*Hayden v. Collins*, 1 Cal. App. 259, 266, 81 Pac. 1120. The guardian of an insane person, appointed on the removal of a former guardian may institute proceedings to reclaim, in the interest of the ward, funds of the latter which have been fraudulently invested in property taken in the name of the removed guardian's wife.—*Clingman v. Hill*, 104 Kan. 145, 178 Pac. 243.

## REFERENCES.

Contracts and rights of insane persons.—See head-line 9, *infra*.

(5) **Action on guardian's bond.**—An action on the bond of a lunatic's guardian can not be maintained against the surety alone if the guardian has been released and discharged by final judgment of a court of competent jurisdiction.—*Sparr v. Globe Surety Co.*, 99 Kan. 481, 486, 162 Pac. 305. An action on a guardian's bond is barred, under the statute of Washington, unless commenced within six years after the death of the guardian.—*Newberry v. Wilkinson* (Wash.), 199 Fed. 673, 683.

(6) **Duty to defend action against ward.**—A stipulation, by the guardian of an idiot, to abide the result of an action under a defense interposed by another defendant is not a compliance with the statutory duty of a guardian to defend actions brought against his ward. A stipulation to abide the result of the action interposed by another is not defending the action.—*Mattson v. Mattson*, 29 Wash. 417, 69 Pac. 1087, 1089.

(7) **Transfer of property.**—Under the circumstances of the instant case, the continuance of an ancillary guardianship in Colorado of an insane resident and citizen of Missouri, committed to a state institution in that state, is an unnecessary expense and burden to the estate, and the Missouri guardian is entitled to have the property of his ward in Colorado transferred to him.—*Craig v. Dewey* (Colo.), 176 Pac. 836, 837. An ancillary guardian in Colorado of an insane person, resident in Missouri and having a guardian there, must turn over to the latter, on his demand, the ward's funds in his hands, and is liable for interest on the amount if he delays such return.—*Craig v. Dewey* (Colo.), 176 Pac. 836, 838. The cashier of a bank, who has been appointed ancillary conservator in Colorado of moneys belonging to the estate of a Missouri insane person, and who wrongfully refuses to pay over to the Missouri guardian of the person and estate of such insane person such money and certificates of deposit when due, are liable for interest on the funds for the wrongful and unlawful withholding.—*Craig v. Dewey* (Colo.), 176 Pac. 836, 838. The sole matter to be considered, in disposing of a question as to the right of a domiciliary guardian of an insane ward to have transferred to him the property of his ward in this state, is the welfare of the ward.—*Craig v. Dewey* (Colo.), 176 Pac. 836, 837.

(8) **Effect of ward's death.**—The powers and duties of the guardian of a lunatic can have no relation to a will made by the ward; because the death of the ward, which alone could give the will effect, would end the guardianship.—*Pond v. Faust*, 90 Wash. 117, Ann. Cas. 1918A, 736, 155 Pac. 776. The guardian of a lunatic does not, on the latter's death, waive his recourse against the ward's estate by failing to present his claim to the administrator.—*Estate of Clanton*, 171 Cal. 381, 153 Pac. 413.

## 7. "Conservators." In Colorado.

(1) **Appointment. Notice. Jury.**—Upon the petition of a reputable person alleging that another is of unsound mind, the county court may summon a jury to determine the fact, and if it be alleged and proved that such person has property, and is so mentally unsound as to be unable to properly manage the same, a conservator may be appointed to protect the estate, without a violation of the constitutional right to acquire and possess property.—*Shapter v. Pillar*, 28 Colo. 209, 63 Pac. 302, 304. But an order appointing him, without notice to such incompetent, should be set aside, even though such notice is not required by statute.—*Jones v. Learned*, 17 Colo. App. 76, 66 Pac. 1071, 1072. If the statute requires that a jury must find that such incompetent is incapable or unfit to manage his affairs before the conservator can be appointed, an appointment without such verdict is void.—*Jones v. Learned*, 17 Colo. App. 76, 66 Pac. 1071, 1072. Where a conservator was appointed in one state, and it appears that he and a conservator, afterwards appointed in another state, have discharged their duties with fidelity, and have obtained a large judgment in favor of their ward, and interest in valuable mining property in the latter state, a court there will not set aside the appointment in that state for want of jurisdiction in the court making the appointment, at the suggestion of relatives of the ward, who for many years allowed the insane person to remain in the asylum without any attention upon their part, and who made no attempt to alleviate his condition, especially where they did not manifest any interest in his behalf until the successful termination of the litigation.—*Wood v. Throckmorton*, 26 Colo. 248, 57 Pac. 699, 700.

(2) **Duties. Investment of funds.**—It is the duty of a conservator to exercise reasonable care and diligence in investing, from time to time, such portion of the trust funds in his hands as can be utilized for that purpose, and still leave him with sufficient to meet the expenditures in behalf of the estate which he may be called upon to make; and, having failed to do so, he is, unless he has presented a valid excuse, chargeable with legal interest on the funds which he could have invested.—*In re Thomas's Estate*, 26 Colo. 110, 56 Pac. 907, 911. He is allowed a reasonable time, of course, after receiving the ward's funds within which to invest them, which, in the absence of any proof on the question, is usually placed at six months.—*In re Thomas's Estate*, 26 Colo. 110, 56 Pac. 907, 911. The conservator is not excused for failure to invest the funds of his ward by the advice of the county judge, that it is his duty to keep the funds of the estate in his hands so that he can turn them over promptly if his ward become sane; nor is he excused by the fact that the alleged insane person, from time to time, applied to be adjudged sane, and to be placed in the control of his affairs.—*In re Thomas's Estate*, 26 Colo. 110, 56 Pac. 907, 911. When no investments have been made by the conservator, and it is necessary to pay out sums from time to time for the benefit of the estate and the support of the ward, no inflexible rule can be laid down which would

be applicable in all cases for the purpose of determining upon what portion of the funds interest should be charged; each case must, in a measure, be governed by its own peculiar circumstances; and a sound discretion must be exercised in determining how interest shall be computed in such cases.—In re Thomas's Estate, 26 Colo. 110, 56 Pac. 907, 911. The conservator should be charged with interest, where he has mingled the funds of his ward with his own funds, and it appears that the mingled funds have been used indiscriminately, although he may have had on hand at all times an amount sufficient of the funds so mingled to pay the balance belonging to the estate.—In re Thomas's Estate, 26 Colo. 110, 56 Pac. 907, 912.

(3) **Exceptions to report. Compensation. Removal. Discharge.**—Although there may be no special statute regarding the filing of exceptions to the report of a conservator, such exceptions, although indefinite and very general, should, as a matter of practice, be sustained, if they inform the conservator that all his charges against the funds in his hands will be contested except those items that he has paid under order of court, and advises him that a claim will be made on behalf of the estate for interest on the funds which he has received.—In re Thomas's Estate, 26 Colo. 110, 56 Pac. 907, 909. The conservator of the estate of a lunatic is entitled to receive such compensation for his care and trouble as the court may deem reasonable. It is not to be computed, as commissions, but determined by the reasonable value of the time he has necessarily devoted to the discharge of his duties.—In re Thomas's Estate, 26 Colo. 110, 56 Pac. 907, 912. In the absence of a statute to the contrary, periodical or partial settlements, as evidenced by reports of conservators, are, at most, after approval by the court, but prima facie evidence of their correctness, and may be rectified or rebutted on a final accounting. They are not settlements, but only the exhibition of accounts; nor judgments, being merely ex parte presentations of the status of the estate in the hands of the conservator.—In re Thomas's Estate, 26 Colo. 110, 56 Pac. 907, 912. The court having jurisdiction is vested with a large discretion in the removal of conservators. It may remove a conservator for any default or misconduct upon his part, and its discretion will not be interfered with, except in plain cases of abuse. The effect of requiring a conservator to pay the funds of his ward into court is to discharge him.—In re Thomas's Estate, 26 Colo. 110, 56 Pac. 907, 912.

#### 8. Report, account, and settlement of guardian.

(1) **In general.**—The clerk of the superior court is a mere ministerial officer, and is not authorized to make any examination of the account and report of the guardian of an insane person. That is a matter for the judge of the court.—Denny v. Holloway, 17 Wash. 487, 49 Pac. 1073, 1074. Express findings are unnecessary in proceedings to settle a guardian's account; all facts necessary to sustain the judgment or order of the lower court will be presumed.—Estate of Averill, 6 Cal.

Unrep. 774, 66 Pac. 14, 15. Equity has jurisdiction to afford relief and to compel a full and just accounting by the guardian of an incompetent person where the decree settling his final account was procured by fraud.—*Silva v. Santos*, 138 Cal. 536, 71 Pac. 703. A complaint in equity to compel the guardian of an incompetent person to make a full and just accounting does not improperly unite different causes of action, where the money alleged to be fraudulently retained by the guardian came into his hands as guardian, and the facts alleged all relate to the transactions of the guardian in managing the estate, and in failing, in such management, to perform the duties in the particulars alleged.—*Silva v. Santos*, 138 Cal. 536, 71 Pac. 703, 705. The rule of law which sanctions a proceeding to require the guardian of an incompetent person to render a full and just account is wholesome, and should serve as an admonition to administrators, executors, guardians, and trustees generally, that they must, to the last moment of their trusteeship, scrupulously account for every dollar which has come into their hands in their trust capacity.—*Silva v. Santos*, 138 Cal. 536, 71 Pac. 703, 705. The administrator of the estate of a deceased incompetent person may contest the final account of the guardian of such incompetent.—*Estate of Averill*, 6 Cal. Unrep. 774, 66 Pac. 14, 15. A settlement, in the probate court, of the accounts of the guardian of an insane ward is final and conclusive, where no appeal has been taken from the order of settlement. All inquiry into the correctness of the accounts having been thus finally settled by the proper tribunal, a court of equity will not open them, unless for fraud, omission, or the like, and not then unless the specific mistake or errors are pointed out. It is not enough to allege that, soon after the defendant "was appointed guardian, he became so ignorant and unsound in mind that he was incompetent to attend to any business whatever; that he was in that condition when the final account of his guardianship was rendered and filed; that the accounts which he rendered were unjust and incorrect statements of his transactions as guardian; and that the final account, as settled and allowed by the probate court, was 'false and untrue in many particulars.'"—*Brodrib v. Brodrib*, 56 Cal. 563, 566. There is no statute authorizing service by publication in a proceeding to set aside the final report and discharge of the guardian of a lunatic.—*Sparr v. Globe Surety Co.*, 99 Kan. 481, 162 Pac. 305. The heirs of a deceased lunatic have the right to intervene in the matter of the settlement of the guardian's final account, since they are the real parties in interest and their interests are opposed to the guardian's claims.—*Estate of Clanton*, 171 Cal. 381, 153 Pac. 459.

(2) Collateral attack.—The order of a probate court approving a final account by a lunatic's guardian is a final judgment of a court of competent jurisdiction, and not subject to collateral attack.—*Sparr v. Globe Surety Co.*, 99 Kan. 481, 162 Pac. 305. Where a wife charged herself as guardian of her incompetent husband with the entire interest in a certain note as property belonging to her husband, though



she claimed a half interest in such note, and the husband afterwards died, the order settling her account as guardian and directing her as such guardian to turn over the balance of said estate to the legally appointed administratrix of her deceased husband's estate, was an adjudication against her of the fact that the estate of her deceased husband, and not herself, was the owner of said note and of the whole thereof; and, as such order had become final, it was conclusive of that fact as against her, and could not be collaterally attacked.—*In re McGue's Estate; McGue v. McGue* (Cal.), 181 Pac. 637, 638. The judgment in a probate court, releasing and discharging the guardian of an insane person, is a final judgment of a court of competent jurisdiction, and can not be attacked in a suit against a surety.—*Sparr v. Globe Surety Co.*, 99 Kan. 481, 162 Pac. 305.

(3) *Settlement after ward's death.*—The court has jurisdiction in a guardianship proceeding to settle the account of the guardian after the death of the ward.—*In re McGue's Estate, McGue v. McGue* (Cal.), 181 Pac. 637, 638. The settlement of the final account of the guardian of a lunatic on the latter's death is an equitable proceeding, and therein the court may declare a claim of the guardian to be a lien upon the real estate of the deceased ward.—*Estate of Clanton*, 171 Cal. 381, 153 Pac. 459.

9. *Contracts and rights of insane persons.*—Where a guardian has been appointed by the probate court of the proper county, and a suit to foreclose a mortgage upon the real estate owned by the lunatic for whose estate such guardian was appointed is commenced in the district court of such county, service of summons upon such guardian confers jurisdiction upon the district court to adjudicate the rights of such lunatic in said real estate; and if the property is sold under such proceedings, the lunatic has no right to redeem the property from such sale after his restoration to sanity, merely on the ground that the court did not acquire jurisdiction by service of summons on the guardian.—*Foran v. Healy*, 73 Kan. 633, 85 Pac. 751. A plaintiff, admitted to be of unsound mind, has no capacity to bring an action to partition a tract of land, and what he can not do in person he can not direct or employ an attorney to do for him.—*Gustafson v. Ericksdotter*, 37 Kan. 670, 16 Pac. 91. An unmarried woman, who is an imbecile, and incompetent to testify, can not institute and prosecute a proceeding in bastardy.—*State v. Jehlik*, 66 Kan. 301, 61 L. R. A. 265, 71 Pac. 572. A complaint must state facts showing a cause of action in somebody; and it must show a cause of action in the plaintiff, or a general demurrer will lie. Hence if a plaintiff becomes insane pending suit, the suit should be prosecuted in the name of such insane person, by his guardian. The plaintiff is not deprived of his right or property in the cause of action by his insanity, nor does it vest in his guardian upon his appointment; and an erroneous order, substituting the guardian of his person and estate as plaintiff, is not

cause for dismissal, but the plaintiff should have leave to reform his complaint, in accordance with the law.—*Dixon v. Gries*, 106 Cal. 506, 39 Pac. 857. The judicial tendency of this enlightened age is against the enforcement of an executory contract procured by a shrewd man of affairs from one known to be mentally incapable of dealing with judgment and discretion. Hence the act of taking unfair advantage of such a person's inability to understand the nature and consequences of a purported agreement to convey his homestead is good ground for denying specific performance, and especially so when he has returned to the prospective grantee all that he ever received.—*Miller v. Tjexhus*, 20 S. D. 12, 104 N. W. 519, 520.

(1) *Contracts and wills*.—Though a party be entitled to jury trial, the court in refusing it does not act prejudicial if the sole question involved is whether the guardian of an imbecile ward may make a binding contract to sell his real estate without the order of the probate court.—*Nichols v. Bryden*, 86 Kan. 941, 122 Pac. 1119. An agreement to furnish board and lodging to a dipsomaniac does not necessarily include nursing, and unless the contract for the former includes the latter in express terms or in language from which no other just conclusion can be drawn, a promise to pay for such nursing will be implied.—*Sawash v. Emerson*, 32 Cal. App. 13, 19, 161 Pac. 1018. Under the provisions of section 4691, Mills' Ann. Stat. 1912, the contract and deed of an adjudged lunatic are absolutely void, and property attempted to be conveyed thereby should be restored by the court to such lunatic or her conservator.—*Rohrer v. Darrow* (Colo.), 182 Pac. 13, 15. One who has been adjudged mentally incompetent to manage his property, and whose estate is managed by a guardian duly appointed, may make a valid will, if actually restored to capacity at the time, though his restoration has not been judicially determined.—*Hill v. Davis* (Okla.), 167 Pac. 465, 468; *Cobb v. Davis* (Okla.), 167 Pac. 465, 468.

(2) *Rights of insane and incompetents*.—A lunatic, released from confinement as improved, may, in a proper manner and season, bring his case before the probate court to be inquired into; and the court's determination after such inquiry, must control as against outside considerations.—*State v. Linderholm*, 95 Kan. 669, 149 Pac. 427. Neither guardians nor courts having jurisdiction over the estates of incompetent persons have power to bind the persons or estates of such persons unless expressly authorized to do so, and no authority exists to so bind such persons or estates by way of a compromise of a suit to set aside a conveyance by an adjudged lunatic is given by law.—*Rohrer v. Darrow* (Colo.), 182 Pac. 13, 15. The question whether the guardian of an insane person, as of the latter's residence in another state, may be given control of property of the ward situate in Colorado is to be decided according to the best interests of the ward.—*Craig v. Dewey* (Colo.), 176 Pac. 836. A suit to set aside a deed executed by an adjudged lunatic can not be compromised without nullifying the

statute which declares such a deed to be absolutely void; and a judicial decree which permits such a compromise is an attempt to inject life and vitality into an instrument which the law prohibits as contrary to public policy, and is in effect a conveyance of the property of such lunatic not within any purpose authorized by law.—*Rohrer v. Darrow* (Colo.), 182 Pac. 13, 15. Between guardians of incompetents and executors of decedents' estates, there is no such analogy as to make it proper for the court to adopt as to the former, the limitation prescribed in the statute, referring to claims against estates in probate.—*Clough v. Monro*, 86 Wash. 507, 150 Pac. 1190. The filial relation between parent and child should prompt the latter to care for the former in case of his being feeble minded and unable to care for himself, but in the absence of statute he is under no legal obligation to do so.—*In re Erickson*, 104 Kan. 521, 180 Pac. 263.

#### REFERENCES.

Use, by a court of chancery, of lunatic's property.—See note 34 L. R. A. 297-300. Test of mental capacity to make contracts.—See note 3 L. R. A. (N. S.) 174. Deed by insane person when under guardianship.—See note 19 L. R. A. 490, 491. Right of insane person to institute proceedings by next friend.—See note 64 L. R. A. 513-534. Validity of deed by incompetent person.—See note 19 L. R. A. 489-493. Action by insane person.—See note 2 L. R. A. (N. S.) 961. Opinion evidence, admissibility of, as to mental capacity of person to execute contract or deed.—See note 4 Am. & Eng. Ann. Cas. 888.

#### 10. Adjudication of insanity, and its effect.

(1) *In general.*—The finding of a jury on an inquest, that the subject of inquiry is feeble in mind, is incapable of managing his business affairs, and is a typical imbecile, is not a finding of insanity within the statutory meaning of that term, and furnishes the probate court no authority to appoint a guardian for such feeble-minded person, and consequently the guardian so appointed has no right to maintain an action in behalf of such person.—*Caple v. Drew*, 70 Kan. 136, 78 Pac. 427, 429. An adjudication of lunacy, legally had, is conclusive upon the lunatic and all other persons, and the probate court of the county where such lunatic has a permanent residence may accept and act thereon, the same as if such adjudication had occurred in that court.—*Foran v. Healy*, 73 Kan. 633, 85 Pac. 751. Where a person was held to answer for a crime, and was insane when the preliminary examination was had, and when the order of commitment was made, the proceedings are void.—*Ex parte Wright*, 74 Kan. 406, 86 Pac. 460.

(2) *Presumption and evidence.*—The fact of insanity having been once established, it is presumed to continue until the demented person is shown to have been restored to reason.—*Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745, 747. An allegation in a petition that plaintiff em-

ployed counsel to set aside a judgment rendered against the plaintiff will not overthrow a finding by the court that plaintiff was at the time of unsound mind and incapable of managing his own affairs.—*Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745, 747. The presumption, however, of continued insanity arising from an adjudication thereof may be overcome by evidence other than an adjudication of restoration.—*Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779, 781; *Lower v. Schumacher*, 61 Kan. 625, 60 Pac. 538, 539. In determining the question whether a person is so mentally unsound as to be incapable to care for his property, the admission of opinion evidence as to his capacity is not properly the subject of opinion evidence, but must be determined from the probative facts bearing thereon.—*Shapter v. Pillar*, 28 Colo. 209, 63 Pac. 302, 304.

#### REFERENCES.

Evidence of insanity of ancestors or kindred, admissibility of, on issue of sanity.—See notes 6 Am. & Eng. Ann. Cas. 29, 7 Am. & Eng. Ann. Cas. 267.

#### 11. Restoration to capacity. Termination of guardianship.

(1) *Restoration to capacity.*—The provision in section 1666 of the Code of Civil Procedure of California, authorizing the court to restore the person adjudged insane or incompetent to capacity, is applicable only to persons adjudged insane or incompetent, and for whom guardians have been appointed under section 1764 of the same code. The application of it to persons committed to asylums would be utterly inconsistent with the government of those institutions according to the requirements and regulations of the Political Code. Hence a person who has been regularly examined and committed to the state insane asylum, though out on parole, can not maintain an original petition for a writ of mandate to be directed to the court which examined and committed him, commanding such court "to proceed to take testimony and try, hear, and determine" his application, which prays for a judicial determination that the applicant is of sound mind, capable of taking care of himself and his property, and for restoration to capacity.—*Aldrich v. Superior Court*, 120 Cal. 140, 142, 52 Pac. 148. A judgment of restoration to capacity of an insane person is conclusive upon the condition or relation of the person.—*Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900, 903.

#### REFERENCES.

The act providing for the restoration to capacity of persons adjudged to be insane, who had no guardians, and who were not confined at the state asylum for the insane was repealed in 1909.—See *Henning's General Laws of California*, 2d Ed. page 767, Act 2161.

(2) *Termination of guardianship, generally.*—When the court finds that an incompetent person, for whom a guardian has been appointed, has become sane and competent, the ward is immediately entitled to

the full control both of his person and estate, and the court has ample power to make and enforce any decree or judgment proper in the premises; hence, when this fact is found, the court may terminate the guardianship proceedings, making proper provision for the payment of debts and as to matters involving the striking of a balance between the guardian and the ward.—*In re Bayer*, 80 Wash. 340, 345, 141 Pac. 682. The appointment and qualification of a guardian give the court general jurisdiction over the ward, which continues in a case of insanity until the ward recovers his reason, when the right to manage the estate by the court or guardian ceases and the statute of the state of Washington requires that the court shall conduct such inquiry as it thinks proper to establish the facts.—*Jorgenson v. Winter*, 69 Wash. 573, 125 Pac. 959. A statute which provides that every guardian of an incompetent person shall have the custody of the person of his ward and his estate until such guardian is "legally discharged" does not extend the authority of an incompetent's guardian until he is discharged by the order of court, but, under a statute which provides that if, on an inquiry, it be found that an incompetent has been restored to capacity, the guardianship shall cease, the authority of such guardian is terminated ipso facto by an adjudication that such incompetent person has been restored to capacity.—*In re Scheuer's Estate*, 31 Mont. 606, 79 Pac. 244. The court having found that the ward was sane and competent, she was entitled to the immediate full control of both her person and estate, under the statute, and the lower court though determining a matter usually heard on the probate side of the court, was still sitting as a superior court of general jurisdiction, with ample power to make and enforce any decree or judgment proper in the premises; for this reason, following the plain mandate of the statute it was better to terminate the guardianship proceeding when the ward was found fully competent to care for and manage her person and estate, making proper provision for the payment of debts or matters involving the striking of a balance between the guardian and ward.—*In re Bayer*, 80 Wash. 340, 141 Pac. 684. The court having jurisdiction of an insane person may accept the resignation of a guardian or discharge him without notice to the ward.—*Jorgenson v. Winter*, 69 Wash. 573, 125 Pac. 959.

(3) *Termination by death of ward.*—The appointment of an administrator of the estate of an insane person, who has died, terminates the control of the guardian over the person's property.—*Eisenhower v. Vaughn*, 95 Wash. 256, 163 Pac. 758. When an insane ward dies, the death terminates the guardianship, and all unsettled claims created thereunder against the estate must be settled out of the estate in the hands of the administrator in due course of administration; this applies to a fee allowed to the guardian's attorney.—*Eisenhower v. Vaughn*, 95 Wash. 256, 163 Pac. 758.

**12. Proceedings against insane persons.**

(1) **In general.**—If a plaintiff in an action knows that the defendant, at the time such action is brought, is not in a condition to attend to any business, and is non compos mentis, and was so both at the time service was obtained and when judgment rendered, it is incumbent on him to suggest it to the court, in order that a guardian ad litem may be appointed.—*Townsend v. Price*, 19 Wash. 415, 53 Pac. 668, 669. It may be that service might regularly be made upon an insane person, and that the judgment obtained from such service is not void, but voidable merely; yet in an action on a judgment recovered in a court of record in another state, and under proper averments, evidence may be admitted that a guardian ad litem was never appointed.—*Townsend v. Price*, 19 Wash. 415, 53 Pac. 668, 669. Guardians should be appointed to represent insane persons, and such persons may be sued and jurisdiction over them acquired, as of other persons, but a judgment against an insane person who has no guardian, and without the appointment of a guardian ad litem, though irregular, is not void. Such judgment may be vacated in a direct proceeding if no innocent person has acquired rights under it.—*Dunn v. Dunn*, 114 Cal. 210, 46 Pac. 5; *White v. Hinton*, 3 Wyo. 753, 17 L. R. A. 66, 30 Pac. 953; *Pollock v. Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885. Neither an incompetent person, nor his estate, can make any appearance whatsoever, except by and through a legally appointed guardian. The fact that a party becomes an incompetent while indebted to an attorney, who was representing him at the time with respect to his property interests, does not give such attorney the right to appear for the incompetent's guardian.—*State v. District Court*, 30 Mont. 8, 75 Pac. 516. While evidence of adjudication of unsoundness of mind may make out a prima facie defense, yet in an action against a person of unsound mind, it is not conclusive, and it may be shown by any competent evidence that defendant was of sound mind at the time he executed the contract.—*Walker v. Coates*, 5 Kan. App. 209, 47 Pac. 158. The act of March 11, 1893 (Laws of Washington 1893, ch. CXX, p. 286), concerning incompetents residing out of the state, repeals all conflicting laws, and authorizes the sale of the property of the non-resident incompetent for the payment of debts, etc., on application of the domestic guardian.—*Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005. In an action against an incompetent on a promissory note, the court obtains jurisdiction of the person of the ward, where it is plain from the language of the answer that the guardian intended to appear for and represent his ward in the case, and that the ward appeared and answered by the guardian.—*Mullen v. Dunn*, 134 Cal. 247, 66 Pac. 209. Where the general guardian of an incompetent person is in possession of mortgaged premises belonging to such incompetent, which have been sold, the presentation of a commissioner's deed to such guardian and demand of the premises, both as guardian and individually, is a sufficient

demand, without a demand being made on the incompetent.—*Taylor v. Ellenberger*, 6 Cal. Unrep. 725, 65 Pac. 832, 833. A person who, after being confined as an insane patient, escaped and committed a crime for which he was sentenced to imprisonment, is not entitled to release on habeas corpus on the ground that he was insane when he committed such crime.—*Myers v. Halligan* (Wash.), 244 Fed. 420, 157 C. C. A. 46. Personal service in another state of a citation issuing out of a county court of a particular county in South Dakota is sufficient to bring back an insane resident of that county before the court in proceedings for the appointment of a guardian for his or her property where such incompetent resident had been taken from the state to avoid service in guardianship proceedings; provided, a citation within the county was previously issued and had been returned "non est," and the court had been advised that the party was removed from the state to avoid such service.—*In re Hendrickson* (S. D.), 167 N. W. 172.

#### REFERENCES.

Service of process on the guardian of an infant, insane, or incompetent person. See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1722.

(2) *Sale of property.*—The rule of caveat emptor applies to judicial sales as well as those between private persons, and in this connection a sale by the guardian of a mental incompetent, under order of the probate court and by it confirmed, is a judicial sale.—*In re Standwaitie's Estate* (Okla.), 175 Pac. 542, 543. At the sale of a ward's real estate by the guardian under order of the county court a person who makes a bid conditionally on the ward's title being found satisfactory, after examination contemplated by him, is not in the position of a purchaser at all, and the bid can not be received.—*In re Standwaitie's Estate* (Okla.), 175 Pac. 542. Although the purchaser at a guardian's sale is not required, as a matter of practice, to pay the price bid until confirmation of the sale, yet, at such confirmation, it must be paid on demand, and a new sale ordered in case of default.—*In re Standwaitie's Estate* (Okla.), 175 Pac. 542.

(3) *Judgment. Execution. Limitation of actions.*—"While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femes covert* and infants by jurisdictional proceedings in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but, by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them, it is said, are neither void nor voidable; the proper remedy in favor of a lunatic being to apply to chancery to restrain proceedings, and to compel plaintiff to go there for justice. In a suit against a lunatic, the judgment is properly entered against him, and not against his guardian. A lunatic has capacity to appear in court by an attorney. The legal title to his estate remains in him, and does not pass to his guardian."

—*Pollock v. Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885, citing *Freeman on Judgments*, 4th ed., § 152. A judgment against an insane surety on an attachment bond is valid, where such surety was sane at the time the bond was executed.—*Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885. An execution of a valid judgment may run against the property of a lunatic.—*Pollock v. Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885, 886. Even a judgment rendered subsequently to the establishment of defendant's insanity is not void, and the judgment debtor's land is subject to execution. Hence the creditor is not obliged to file his claim for settlement in due course of the administration of the estate. The remedy of a lunatic, or of his estate, is an action in equity to set aside the judgment, if it was fraudulently obtained. If the judgment was not fraudulently or wrongfully obtained, then no harm was worked upon the defendant; and if it was, the courts will set it aside.—*Pollock v. Horn*, 13 Wash. 626, 52 Am. St. Rep. 66, 43 Pac. 885, 886. In Washington, proceedings to set aside a judgment rendered against a person of unsound mind are, by express provisions of the statute, not barred until the expiration of one year from the removal of the disability.—*Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065, 1066. Under the statute of Washington an action against an incompetent person may be brought in form, and so entitled in the caption, against the guardian, as such; and service of summons upon the guardian, as such, confers jurisdiction upon the court to enter judgment against the estate of the ward.—*Clough v. Monroe*, 86 Wash. 507, 150 Pac. 1190. A judgment in an action for personal injuries against a person known to be insane, and who has no guardian, either general or ad litem, should be set aside.—*Winslow v. McCarthy* (Cal. App.), 178 Pac. 720, 721.

### 13. Appeal and review.

(1) *Right to appeal*.—A person who has been adjudged to be insane is an "aggrieved party," within the law relating to appeals and has a right to appeal from the order adjudging him to be insane and appointing for him a guardian.—*Appeal of Kane*, 12 Mont. 197, 29 Pac. 424. In proceedings for the appointment of a guardian for an alleged incompetent, neither the incompetent nor the attorney can consent to the entry of an order appointing a guardian so as to deprive the incompetent of the right to appeal therefrom.—*In re Sullivan*, 143 Cal. 462, 77 Pac. 153. Nor is such incompetent deprived of the right to appeal from an order appointing a guardian on the ground of his incompetency because he had sought an order restoring him to capacity.—*In re Sullivan*, 143 Cal. 462, 77 Pac. 153. Under a statute which provides that an appeal may be taken from any order granting or refusing to grant letters of guardianship, an appeal may be taken from an order appointing a guardian for an incompetent person.—*In re Moss*, 120 Cal. 695, 53 Pac. 357. A statute which provides that mentally incompetent persons can take an appeal only by their general guardian or guardian ad litem appointed by the court does not apply to a case



where the very question involved is the validity of the order of guardianship itself, and where the appeal is taken directly from that order.—*In re Moss*, 120 Cal. 695, 53 Pac. 357. One who has been adjudged incapable of managing his own affairs is entitled to sue out a writ of error, without a guardian ad litem, to review the judgment.—*Shapter v. Pillar*, 28 Colo. 209, 63 Pac. 302, 303. It is the duty of the guardian of an insane ward to protect the latter's estate against what he considers an unjust or illegal claim, and he has a right to appeal from an order of the court requiring him to pay out of the money of his ward, where the court has no power to make such order.—*Guardianship of Breslin*, 135 Cal. 21, 22, 66 Pac. 962. The constitution and statutes of the state of Nevada were construed and it was held that a proceeding for the appointment of a guardian for an insane person is equitable; that the judgment appointing such guardian is final; and that an appeal lies therefrom.—*O'Donnell v. Sixth Judicial District Court*, 40 Nev. 428, 165 Pac. 759, 760. An appeal lies from an order appointing a guardian to take care of the estate of an insane person.—*O'Donnell v. Sixth Judicial District Court*, 40 Nev. 428, 433, 165 Pac. 759. An appeal may be taken from a decision of the probate court adjudging that a person is of feeble mind and incapable of managing his affairs and appointing a guardian for his person or estate.—*Ald's Estate v. Appling*, 89 Kan. 340, 131 Pac. 569. One who initiates proceedings in the probate court to have his father declared feeble minded and incapable of managing his estate is not entitled to an appeal from an adverse ruling, since thereby he loses nothing and suffers no substantial injury.—*In re Erickson*, 104 Kan. 521, 180 Pac. 263. An adjudication of the incompetency of a person can not be entered by his consent. If he is in fact incompetent, he can not consent, and if not incompetent, his consent can not make him so. Hence the rule that an appeal will not be entertained from a judgment entered by consent has no application to an order appointing a guardian of the person and estate of an incompetent person.—*Guardianship of Sullivan*, 143 Cal. 463, 77 Pac. 153. On appeal from an order appointing a guardian for an insane person all intendments and presumptions are in favor of the regularity and propriety of the order, in the absence of a transcript of the testimony and proceedings before the trial court.—*In re Espinosa's Estate and Guardianship*, — Cal. —, 175 Pac. 896.

#### REFERENCES.

Guardians of insane and incompetent persons.—See *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1763-1767, and notes. See separate note to § 200, post, on commitment and discharge of insane persons.

(2) Notice of appeal.—Upon appeal by the alleged incompetent person, the notice of appeal need only be served upon the guardians to whom letters were granted. It need not be served upon one who has ceased to be a party to the proceeding.—*Guardianship of Sullivan*, 143 Cal. 462, 77 Pac. 153.

(3) **Stay of proceedings.**—The statute of Nevada makes no provision for appeals from judgments appointing guardians for insane persons, and it is held that the perfection of an appeal by giving the undertaking prescribed by section 404, Civil Practice Act, stays proceedings in the court below, upon the judgment or order appealed from, under the provisions of section 5355, Revised Laws.—*O'Donnell v. District Court (Nev.)*, 165 Pac. 759, 760.

(4) **Power of guardian pending appeal.**—The power of one appointed guardian of the person and estate of an incompetent person is stayed pending an appeal from the order of appointment, by the filing of the undertaking on appeal provided for by section 941 of the Code of Civil Procedure. If the guardian, notwithstanding such appeal, threatens to take possession of the property of the incompetent and to act as his guardian pending the appeal, a writ of supersedeas will be issued against him.—*Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26. Such a construction of the effect of section 941 of the Code of Civil Procedure, in staying the functions of the guardian pending appeal, is not opposed to sound public policy.—*Coburn v. Hynes*, 161 Cal. 685, 120 Pac. 26.

(5) **Right of ward pending appeal.**—That it is not to the interest of an insane person, and is against public policy, to allow such person to have the management of his property pending his appeal from an order appointing a guardian of his estate, is not a potent argument with the court; it must enforce the law as the law is.—*O'Donnell v. Sixth Judicial District Court*, 40 Nev. 428, 434, 165 Pac. 759.

(6) **Dismissal of appeal.**—An appeal taken by a guardian ad litem, who failed to file a bill of exceptions, or statement on appeal, and who did not request the clerk of the lower court to certify any transcript of the record on appeal, will be dismissed, where no such transcript is on file.—*In re Moss*, 7 Cal. Unrep. 172, 74 Pac. 546. If an appeal in a proceeding to appoint a guardian for an incompetent is taken by the incompetent himself, the court will, upon his written request, after notice to his attorneys thereof, dismiss such appeal.—*In re Moss*, 7 Cal. Unrep. 172, 74 Pac. 546. An appeal from an order settling the final account of the guardian of a lunatic, on the ward's death, should not be dismissed merely because the proposed bill of exceptions and the transcript on appeal were not served upon the administrator.—*Estate of Clanton*, 171 Cal. 381, 153 Pac. 459.

(7) **Supplement to transcript.**—On appeal by heirs of a deceased lunatic from an order approving the guardian's final account, the transcript, if it fails to show the interest of the appellants, may be cured by a supplement thereto filed by the court's permission.—*Estate of Clanton*, 171 Cal. 381, 153 Pac. 459.

(8) **Review in general.**—Upon a petition to revoke letters of guardianship of an incompetent person, and to appoint petitioner as guardian, where the order for the citation to issue is in the record, but not

the citation itself, though the record recites that citation was issued pursuant to the order, and the guardian came in and answered fully, and had no difficulty in answering because of any insufficient statement in the citation, and as it had served its purpose, she has no cause to complain upon appeal that the citation had no sufficient statement of the nature of the proceeding to enable her to answer the petition.—Guardianship of Tilton, 15 Cal. App. 244, 114 Pac. 594. The supreme court in reviewing the appointment of a guardian for a person alleged to be insane must satisfy themselves from the record that the trial judge had before him sufficient evidence to justify his order, consideration being had of his superior opportunity to estimate the weight and value of the evidence and to determine the mental and physical condition of such person, and that he had not abused his discretion.—*In re Cowper's Estate*, — Cal. —; 176 Pac. 676.

(9) *Review of discretion.*—After a careful examination of the record on an appeal from an order appointing a guardian for an alleged incompetent person, the court is of the opinion that there was sufficient evidence to sustain the finding of incompetency and the order based thereon; and in view of the superiority of the trial judge's opportunity to estimate the weight and value of the evidence, and especially to determine the mental and physical condition of the alleged incompetent, his exercise of discretion in making the order will not be interfered with, there appearing no abuse of the same.—*In re Cowper's Estate* (Cal.), 176 Pac. 676, 677. In the matter of the appointment of a guardian for an incompetent person a court does not necessarily abuse its discretion by appointing a stranger and refusing to ratify the choice of all the incompetent's kinsfolk.—*In re Crocker's Estate*, 174 Cal. 660, 163 Pac. 1015.

(10) *Review of evidence.*—Record examined, and it is held that the evidence reasonably supports the findings of the trial court as to the incompetency of the plaintiff in error herein.—*Yarhola v. Strough* (Okla.), 166 Pac. 729, 730. Where the findings substantially support the petition, and are amply sufficient fully to support the order complained of removing the original guardian and appointing the petitioner as guardian, and where the evidence is not returned upon appeal, it must be presumed that the evidence was sufficient to support the findings and justify the order.—Guardianship of Tilton, 15 Cal. App. 244, 114 Pac. 594.

(11) *Review of findings.*—In a proceeding by a son to have a guardian appointed for his father, findings of fact are as essential to precede and support the judgment rendered by the court on the particular issue tried by him as is a verdict in a case tried by a jury.—*In re Manning*, 38 Utah 281, 112 Pac. 169. The rule that the findings of a trial court upon disputed issues of fact are not to be overturned on appeal unless they totally lack the support of substantial evidence is applicable to findings in proceeding for the appointment of a guardian for an alleged

incompetent.—*In re Coburn*, 165 Cal. 202, 131 Pac. 352. A finding as to one specific act of neglect of duty of the guardian beyond the allegations of the complaint may be disregarded, and can not be said to make the findings broader than the allegations of the petition in any objectionable sense, where all the other findings are within its averments, and sufficient.—*Guardianship of Tilton*, 15 Cal. App. 244, 114 Pac. 594. An adverse judgment, in a suit by a lunatic's guardian for rescinding an exchange of properties, made by the ward, as having been made for corporation stock of little or no value, is not to be questioned by the plaintiff because part of a finding does not justify it, if it is justified by another part.—*Gazett v. Epperly*, 35 Cal. App. 508, 170 Pac. 634. The court's finding of fact of incompetency, in the order appointing a guardian for an incompetent, is sufficiently made if the order recites that the person conditioned "is an incompetent person as alleged in the petition and the allegations of the petition are true.—*In re Espinosa's Estate and Guardianship*, — Cal. —; 175 Pac. 896.

## REFERENCES

Citations.—See note post, on probate practice and procedure, sub-head 3.

## CHAPTER VIII.

## SPENDTHRIFTS AND DRUNKARDS.

- § 178. Court may appoint guardian for spendthrift.
- § 179. Notice to spendthrift. Hearing and appointment.
- § 180. Copy of complaint to be filed. What contracts are rendered void.
- § 181. Allowance to ward for expense of defense.
- § 182. Powers and duties of guardian of spendthrift.
- § 183. Meaning of term "spendthrift."
- § 184. Habitual drunkards. See next succeeding seven sections.
- § 185. Adjudging one to be an habitual drunkard.
- § 186. Relative may make complaint.
- § 187. Summons. Hearing.
- § 188. Information. Appointment of guardian. Powers.
- § 189. Form. Complaint against habitual drunkard.
- § 190. Vacating judgment of drunkenness.
- § 191. Form. Petition to vacate judgment of drunkenness.

**§ 178. Court may appoint guardian for spendthrift.**

When any person by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his estate as to expose himself or his family to want or suffering, or the county to charge and expense for the support of himself and family, the county court for such county of which such spendthrift is a resident or an inhabitant shall present a complaint to the county judge setting forth the facts and circumstances of the case, and praying to have a guardian appointed for him.  
—*Lord's Oregon Laws*, § 1322.

## ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

**Alaska**—Laws of 1913, chapter 9, page 9; amending section 1730, Compiled Laws of 1913.

**Hawaii**—Revised Laws of 1915, sections 3026, 3027.

**North Dakota**—Compiled Laws of 1913, section 8890.

**§ 179. Notice to spendthrift. Hearing and appointment.**

The county judge shall cause notice to be given to such supposed spendthrift of the time and place appointed for hearing the case, not less than ten days before the time so appointed; and if, after a full hearing, it shall appear to the judge that the person complained of comes within the description contained in the preceding section, he shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified.—*Lord's Oregon Laws*, § 1323.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 1730.

Hawaii—Revised Laws of 1915, sections 3026, 3027.

**§ 180. Copy of complaint to be filed. What contracts are rendered void.**

After the order of notice has been issued, the complainants shall cause a copy of the complaint, with the order of notice, to be filed in the office of the county clerk for the county, and if a guardian shall be appointed on such application, all contracts, excepting for necessities, and all gifts, sales, or transfer of real or personal estate made by such spendthrift, after such filing of the complaint in the county clerk's office, and before the termination of the guardianship, shall be null and void.—*Lord's Oregon Laws*, § 1324.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 1731.

Hawaii—Revised Laws of 1915, section 3028.

**§ 181. Allowance to ward for expense of defense.**

When a guardian shall be appointed for an insane person or spendthrift, the judge shall make an allowance, to be paid by the guardian, for all reasonable expenses incurred by the ward in defending himself against the complaint.—*Lord's Oregon Laws*, § 1325.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1732.

Hawaii\*—Revised Laws of 1915, section 3030.

**§ 182. Powers and duties of guardian for spendthrift.**

Every guardian so appointed for a spendthrift shall have the care and custody of the person of the ward, and the management of all his estate, until the guardian shall be legally discharged; and he shall give bond to the state of Oregon, in like manner and with like condition as is before directed with respect to the guardian of an insane person.—*Lord's Oregon Laws*, § 1326.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1733.

Hawaii\*—Revised Laws of 1915, section 3029.

**§ 183. Meaning of term "spendthrift."**

The word "spendthrift" is intended to include any one who is liable to be put under guardianship on account of excessive dinking, gaming, idleness, or debauchery, and this word shall be so construed in all the provisions relating to guardians and wards contained in this or any other statute.—*Lord's Oregon Laws*, § 1342.

**§ 184. Habitual drunkards. See next succeeding seven sections.**

**§ 185. Adjudging one to be an habitual drunkard.**

Any person addicted to the use of intoxicating liquors may, upon complaint thereof, or upon certificate of a justice of the peace, as hereinafter provided, be adjudged an habitual drunkard.—*Rem. 1915 Code, Washington*, § 1708.

**Note.**—Appointment of guardian for an habitual drunkard.—*Rem. 1915 Code, Washington*, § 3349, subd. 13.

**§ 186. Relative may make complaint.**

Either the father, husband, mother, wife, son, or daughter of any person addicted to the excessive use of intoxicating liquors, or any person in the interest of the relative aggrieved, or of the general public, may make complaint to the superior judge of the county wherein such person, so addicted, resides, that the person complained of is an habitual drunkard, and that in consequence thereof, such person is squandering his earnings or property, or that he neglects his business, or that he abuses or maltreats his family, which complaint must be verified by the oath of the complainant, to the effect that the same is true. And every justice of the peace in whose court any person shall have been convicted twice on a charge of being drunk, or drunk and disorderly, shall certify to the superior court of the county in which he resides, that said person has thus twice been convicted.—*Rem. 1915 Code, Washington*, § 1709.

**§ 187. Summons. Hearing.**

Upon filing of the complaint, duly verified, the superior judge shall cause a copy thereof to be served upon the accused forthwith and shall summon him to appear and answer, giving at least ten days' notice; and if upon the hearing of the evidence the allegations of the complaint are sustained, or upon filing a certificate of a justice of the peace, as above provided, such judge shall, in open court, declare the accused to be an habitual drunkard, and shall cause the proceeding to be entered in full upon the records of the court.—*Rem. 1915 Code, Washington*, § 1710.

**§ 188. Information. Appointment of guardian. Powers.**

If information in writing be given to the court or judge of any county that any person in its county is so addicted to habitual drunkenness as to be incapable of managing his affairs, and praying that an inquiry there-



into be had, the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic, or person of unsound mind; and if a guardian is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian mentioned in this chapter.—*Wyoming Rev. Stats. 1899*, § 4897.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Kansas—General Statutes of 1915, sections 6098-6133 (included with lunatics and imbeciles.)

New Mexico—Statutes of 1915, section 3378.

North Dakota—Compiled Laws of 1913, section 8890.

#### § 189. Form. Complaint against habitual drunkard.

[Title of court.]

[Title of action.]<sup>1</sup>

{ Department No. —.  
[Title of form.] }

To the Honorable the — Judge of the — Court of the County of —, State of —.

Now comes —,<sup>2</sup> the plaintiff, and alleges:

That he is the —<sup>3</sup> of said defendant; that said defendant is addicted to the excessive use of intoxicating liquors; that said defendant, by reason of such use, has become, and is, an habitual drunkard; and that said defendant resides in the county aforesaid;

That, in consequence of defendant's said excessive use of intoxicating liquors, and by reason of his being an habitual drunkard, said defendant is squandering his<sup>4</sup> earnings and property,<sup>5</sup> and neglects his business;<sup>6</sup>

That by reason of defendant's habits as aforesaid, the said defendant abuses<sup>7</sup> and maltreats<sup>8</sup> his family.

Complainant therefore prays that the said defendant be declared an habitual drunkard.

—, Attorney for Complainant. —, Plaintiff.

[Add ordinary verification.]

Explanatory notes.—<sup>1</sup> As, John Doe, Complainant, v. Richard Roe, Defendant. <sup>2</sup> Name of plaintiff. <sup>3</sup> The father, husband, or other person interested. <sup>4</sup> Or, her. <sup>5</sup> Or as the case may be. <sup>6</sup> Giving brief statement of facts. <sup>7</sup> State in what respect. <sup>8</sup> State how.

**§ 190. Vacating judgment of drunkenness.**

Any person so declared to be an habitual drunkard may, at any time after the expiration of two years from the time he was so declared to be such, by petition addressed to the judge of the court in which he was so adjudged, have a hearing in such court, upon a day which shall be by such court set, which day shall not be more than ten days after the filing of such petition in such court, which petition may contain a statement of facts tending to show the improved condition and habits of such petitioner and to establish his character for sobriety, and a prayer that the order on record so declaring him to be such habitual drunkard be vacated and he be released from the effects thereof; which petition shall be duly verified by the petitioner. And if upon the hearing of such petition and the evidence in support thereof it appear to the judge that such petitioner is entitled to have such record vacated and be so released, then he shall make an order so declaring that such record be vacated and annulled and that the petitioner be thereafter released from the effects thereof.—*Rem. 1915 Code, Washington*, § 1715.

**Drunkenness**, as it is commonly understood, is the result of the excessive drinking of intoxicating liquors.—10 *Am. & Eng. Ency. of Law*, 276.

**§ 191. Form. Petition to vacate judgment of drunkenness.**

[Title of court.]

[Title of action.]

{	No. —.	Dept. No. —.
	[Title of form.]	

To the Honorable —, Judge of the — Court of —  
County,<sup>1</sup> State of —.

The undersigned, your petitioner, respectfully represents that, on the — day of —, 19—,<sup>2</sup> he was, in said court, adjudged to be an habitual drunkard, and that the court's order so declaring him to be an habitual drunkard is now on record;

That your petitioner has entirely ceased to use intoxi-

cating liquors, and is no longer an habitual drunkard, or a drunkard at all.<sup>3</sup>

Your petitioner therefore prays that the record of said order be vacated and annulled. —, Petitioner.

—, Attorney for Petitioner.

[Add ordinary verification.]

**Explanatory notes.**—<sup>1</sup> The county in which petitioner was adjudged to be an habitual drunkard. <sup>2</sup> This date must be at least two years before the filing of the petition. <sup>3</sup> State briefly the changed habits and improved condition of petitioner.

**Note.**—All proceedings provided by statute relating to guardian and ward subsequently to the appointment of the guardian apply equally to the guardianship of a spendthrift.—*Sturgis v. Sturgis* (Or., Jan. 28, 1908), 93 Pac. 696, 699.

#### SPENDTHRIFTS.

1. In general.
2. Spendthrift trust.

(1) **In general.**—After one has been adjudged a spendthrift by a court of competent jurisdiction, and a guardian has been appointed for him, the presumption is that the necessity for the guardianship continues, until the contrary is shown, and the burden of proving that there is no longer any reason for its continuance is on the ward.—*Guardianship of Humeku*, 14 Haw. 413, 415. The marriage of a female ward, under guardianship as a spendthrift, does not, of itself, operate as a termination of the relationship of guardian and ward, nor operate as a legal discharge of the guardian; but, as the statute provides, it must be made to appear, by proper application to the judge of probate, that such "guardianship is no longer necessary."—*Guardianship of Kapukini*, 12 Haw. 22, 25. The fact that a person is under guardianship as a spendthrift does not render him incapable of making a will.—*Estate of Lunalilo*, 3 Haw. 519, 520. It is the duty of a guardian, having the care of a spendthrift, to furnish him with necessities, or cause them to be directly provided for him; he should not intrust money for that purpose to the spendthrift himself; the furnishing of money is not the furnishing of necessities.—*In re Barker*, 83 Or. 382, 164 Pac. 382. Under the statute of Oregon, a spendthrift is entitled to contract for necessities, but if he does not pay for them his estate must respond.—*In re Barker*, 83 Or. 382, 164 Pac. 382.

2. **Spendthrift trust.**—To create a spendthrift trust, a will need not expressly declare that the interest of the cestui que trust shall be beyond the reach of his creditors; it is sufficient if that intention can be clearly ascertained from the whole will.—*Everitt v. Haskins*, 102 Kan. 546, 171 Pac. 632.

## CHAPTER IX.

### COMMITMENT AND DISCHARGE OF INSANE PERSONS.

- § 192. Charges of insanity, and proceedings thereon.
- § 193. Form. Affidavit of insanity.
- § 194. Form. Warrant of arrest.
- § 195. Form. Certificate of service of warrant of arrest.
- § 196. Form. Order fixing time for hearing and examination.
- § 197. Form. Certified copy of order for hearing and examination.
- § 198. Form. Certificate of service of certified copy of order for hearing and examination.
- § 199. Form. Exhibit A, Medical examination of —, charged with insanity.
- § 200. Form. Physicians' certificate of insanity.
- § 201. Form. Judgment of insanity and order of commitment of insane person.
- § 202. Form. Statement of financial ability.
- § 203. Form. Clerk's certificate as to papers.
- § 204. Attendance and examination of witnesses.
- § 205. Certificate of medical examiners.
- § 206. Order of commitment.
- § 207. Execution of the order of commitment.
- § 208. Right to refuse to receive person committed.
- § 209. Jury trial.
- § 210. Habeas corpus.
- § 211. State hospitals, discharge of patients from.
- § 212. Powers of persons, whose incapacity has been adjudged, after restoration to reason.
- § 213. Contracts by persons without understanding.
- § 214. By persons of unsound mind.
- § 214.1 Arrest, hearing and commitment of inebriates and drug habitues.

### COMMITMENT AND DISCHARGE OF INSANE PERSONS.

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>1. Examination and commitment.</li> <li>(1) In general.</li> <li>(2) Jurisdiction. Distinction.</li> <li>(3) Statutory provisions.</li> <li>(4) Notice, and opportunity to be heard.</li> <li>(5) Evidence.</li> <li>(6) Adjudication of insanity.</li> <li>(7) Setting commitment aside.</li> <li>(8) Commitment papers as evidence.</li> </ul> | <ul style="list-style-type: none"> <li>2. Collateral attack.</li> <li>3. Support, maintenance, and custody.</li> <li>(1) Liability of estate.</li> <li>(2) Suit by directors of asylum.</li> <li>(3) Unauthorized order as to custody.</li> <li>4. Contracts and rights of insane persons.</li> <li>(1) In general.</li> <li>(2) Contract of conveyance. Deed. Mortgage.</li> </ul> |
|---|---|

## 5. Actions.

- (1) In general.
- (2) Suit to set deed aside.

## 6. Restoration to capacity. Discharge.

- (1) Distinction.
- (2) Purpose of statute.

(3) Power to discharge. Habeas corpus.

(4) Power to discharge. "Patient."

(5) Power to discharge. Effect of discharge.

(6) Conclusiveness of discharge.

**§ 192. Charges of insanity, and proceedings thereon.**

Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that any person therein is so far disordered in his mind as to endanger health, person, or property, he must issue and deliver to some peace officer, for service, a warrant directing that such person be arrested and taken before a judge of the superior court of the county, for a hearing and examination on such charge. Such officer must thereupon arrest and detain such person until a hearing and examination can be had, as hereinafter provided.

**COPY MUST BE SERVED.**—At the time of the arrest a copy of said affidavit and warrant of arrest must be personally delivered to said person. Such affidavit and warrant shall be in substantially the following form. (See §§ 193, 194, post).

**ACCUSED MUST BE INFORMED OF HIS RIGHTS.**—He must be taken before a judge of the superior court, to whom said affidavit and warrant of arrest must be delivered to be filed with the clerk. The judge must then inform him that he is charged with being insane, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto.

**ORDER.**—The judge must by order fix such time and place for the hearing and examination in open court as will give reasonable opportunity for the production and examination of witnesses. Said order must be entered in the minutes of the court by the clerk and a certified copy of the same served on such person.

**SERVICE OF NOTICE ON RELATIVES.**—The judge may also order that notice of the arrest of such person and of the hearing on the said charge of insanity be served on such

relatives of said person known to be residing in the county, as the court may deem necessary or proper.—*Kerr's Cyc. Pol. Code*, § 2168.

§ 193. Form. Affidavit of insanity.

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

—, being duly sworn, deposes and says, That there is now in said county,<sup>3</sup> in the city or town of —, a person named —, who is insane, and is so far disordered in mind as to endanger the health, person, and property of himself, and of others, and that he, at —,<sup>4</sup> in said county,<sup>5</sup> on the — day of —, 19—, threatened and attempted —;<sup>6</sup>

That, by reason of said insanity, said person is dangerous to be at large.

Wherefore affiant prays that a warrant of arrest of such person be issued, and that such action may be had as the law requires in the cases of persons who are so far disordered in mind as to endanger health, person, and property.

— (Name of affiant.)

Subscribed and sworn to before me this — day of —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> As, In the Matter of —, an Alleged Insane Person. <sup>2,3</sup> Or, City and County. <sup>4</sup> Name the place. <sup>5</sup> Or, city and county. <sup>6</sup> State threats and actions in detail.

§ 194. Form. Warrant of arrest.

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.]

The People of the State of —.

To any Sheriff, Constable, Marshal, Policeman, or Peace Officer, in this State.

The affidavit of — having been presented this day to

me, —, judge of the —<sup>2</sup> court of the county<sup>3</sup> of —, state of —, from which it appears that there is now in this county,<sup>4</sup> at —,<sup>5</sup> a person of the name of —, who is insane, and who is so disordered in mind as to endanger his own health, person, and property,<sup>6</sup> and that it is dangerous for said person to be at large;

And it satisfactorily appearing to me that said — is insane, and so far disordered in his mind as to endanger health, person, and property; —

Now, therefore, you are commanded forthwith to arrest the above-named person, and take him before a judge of the —<sup>7</sup> court of the said county<sup>8</sup> of —, for a hearing and examination on said charge of insanity;

And I hereby direct that a copy of this warrant, together with a copy of said affidavit, be delivered to said —, at the time of his arrest; and further direct that this warrant may be served at any hour of the night.

Witness my hand this — day of —, 19—.

—, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> As, In the Matter of —, an Alleged Insane Person. <sup>2</sup> Title of court. <sup>3</sup>, <sup>4</sup> Or, city and county. <sup>5</sup> Name the place. <sup>6</sup> Or, the person, lives, and property of others. <sup>7</sup> Title of court. <sup>8</sup> Or, city and county.

**§ 195. Form. Certificate of service of warrant of arrest.**

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.] }

I hereby certify, That I received the above warrant of arrest on the — day of —, 19—, and served the said warrant by arresting the said —, alleged to be insane, and bringing him before the Honorable —, judge of the —<sup>2</sup> court of said county<sup>3</sup> of —, on the — day of —, 19—; and I further certify that I delivered a copy of said warrant of arrest, together with a copy of the affi-

davit of insanity, as directed in said warrant, personally, to said —, at the time of the arrest.

— (Officer serving warrant.)

Explanatory notes.—<sup>1</sup> As, In the Matter of —, an Alleged Insane Person. <sup>2</sup> Title of court. <sup>3</sup> Or, city and county.

**§ 196. Form. Order fixing time for hearing and examination.**

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.]

— having been brought before me on a warrant of arrest and affidavit of insanity, charged with being insane, —

It is hereby ordered, That said — appear before me, at the court-room of said court, at the court-house<sup>2</sup> in the said county<sup>3</sup> of —, state of —, on —,<sup>4</sup> the — day of —, 19—, at — o'clock in the forenoon<sup>5</sup> of said day, for an examination and hearing on said charge, and that he be committed to the custody of the sheriff of said county<sup>6</sup> until said hearing and examination is had.

It is further ordered, That a copy of this order be personally served on said — before said examination and hearing.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> As, In the Matter of —, an Alleged Insane Person. <sup>2</sup> Designate location of court-house. <sup>3</sup> Or, city and county. <sup>4</sup> Day of week. <sup>5</sup> Or, afternoon. <sup>6</sup> Or, city and county.

**§ 197. Form. Certified copy of order for hearing and examination.**

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.]

State of —,  
County<sup>2</sup> of —, } ss.

I hereby certify, That the foregoing is a true copy of the order for hearing and examination made by the Honorable —, judge of the —<sup>3</sup> court of the county<sup>4</sup> of —, in the matter of the alleged insanity of —, on the



— day of —, 19—, and duly entered in the minutes of said court on the — day of —, 19—.

—, Clerk of the — Court, County <sup>5</sup> of —.

By —, Deputy Clerk.

Explanatory notes.—<sup>1</sup> As, In the Matter of —, an Alleged Insane Person. <sup>2</sup> Or, City and County. <sup>3</sup> Title of court. <sup>4, 5</sup> Or, city and county.

**§ 198. Form. Certificate of service of certified copy of order for hearing and examination.**

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

I hereby certify, That I received a duly certified copy of the order for hearing and examination in the matter of the alleged insanity of —, and served the same on said —, the alleged insane person named therein, by delivering to said —, personally, at —,<sup>3</sup> county <sup>4</sup> of —, state of —, on the — day of —, 19—, a true copy of said order for hearing and examination.

Dated —, 19—. — (Officer serving warrant.)

Explanatory notes.—<sup>1</sup> As, In the Matter of —, an Alleged Insane Person. <sup>2</sup> Or, City and County. <sup>3</sup> Name the place. <sup>4</sup> Or, city and county.

**§ 199. Form. Exhibit A. Medical examination of —, charged with insanity.**

State of —, }  
County <sup>1</sup> of —, } ss.

**Statement of Facts.<sup>2</sup>**

1. Name, —. Alleged insane person resides at —,<sup>3</sup> county <sup>4</sup> of —. Age, — years. Nativity, —. If foreign-born, how long in the United States, —. How long in —.<sup>5</sup> Sex, —. Place from which he came to this state, —. Color, —. Occupation, —. Religious belief, —. Education, —.<sup>6</sup> Civil condition, —.<sup>7</sup>

If female and married, give maiden name,——. Give maiden name of mother,——. Number of children,——; living,——; dead,——.

2. Has either parent been addicted to the use of opium, cocaine, tobacco, or alcoholic beverages to excess, or other stimulating narcotics? ——.

3. Have any relatives been eccentric or peculiar in any way in their habits or pursuits? ——. If so, how? ——. Have any relatives, direct or collateral, suffered, or are they suffering, from any form of chronic disease, such as consumption or tuberculosis, syphilis, rheumatism, neuralgia, hysteria, or nervousness, or had epilepsy or falling sickness? ——.

4. Which parent does alleged insane person resemble? mentally, ——; physically, ——. Habits, ——.<sup>s</sup> (a) What degree of intelligence does he possess in comparison with other members of the family? ——. (b) Has alleged insane person normally any eccentricity or peculiarity in manner, speech, or action?——. (c) Has alleged insane person ever been addicted to masturbation or sexual excesses? ——. If so, for how long? ——. (d) Has alleged insane person ever had convulsions? ——. If so, when did he have the first one? ——. When the last one? ——. (e) Had alleged insane person any severe disease, accompanied by prolonged high temperature or convulsions, during the first two years of life, or afterwards? ——. (f) State alleged insane person's habits as to use of liquor, tobacco, opium, or other drugs, and whether excessive or moderate, ——. (g) What is alleged insane person's natural disposition or temperament, and mental capacity? ——.

5. Has alleged insane person insane relatives? ——. If so, state the degree of consanguinity, and whether paternal or maternal, ——.

6. Has alleged insane person any peculiarities of temper or disposition, making him different from other members of the family? ——.

7. What is alleged insane person's general physical condition? —.

8. Specify any disease of which alleged insane person has suffered or does suffer, or any injury received, —.

9. Has alleged insane person ever been an inmate of an institution for the insane? —. If so, state when, —; where, —; how long an inmate, —; whether discharged recovered, or otherwise, —; (a) Number of previous attacks, —; (b) Dates of previous attacks, —; (c) Length of time each previous attack lasted, —.

10. Present attack began, —. (a) Was the present attack gradual or rapid in its onset? —. (b) When was any change in his habits, conversation, or mode of living first noticed? —. (c) Give progress of development of the disease from date of first manifestation to present time, —.

11. Is alleged insane person noisy, restless, violent, dangerous, destructive, incendiary, excited or depressed, homicidal or suicidal? —.<sup>9</sup>

12. Age when menses appeared, —. (a) Amount and character before insanity appeared, —; (b) Since insanity appeared, —; (c) Has menstruation been painful? —; (d) Is it now painful? —.

13. Has the change of life taken place? —. (a) Was it gradual or sudden? —; (b) Give symptoms, —; (c) How changed from normal, —.

14. Memory, —; (a) Sleep, —; (b) Headache or neuralgia, ; (c) Constipation or indigestion, —.

15. What is the supposed cause of insanity? Predisposing, —. Exciting, —.

Facts indicating insanity, personally observed by me, as follows:

The alleged insane person said —.<sup>10</sup>

The alleged insane person —.<sup>11</sup>

Other facts indicating insanity, including those communicated to me by others, as follows: —.<sup>12</sup>

Illusions, ——. Hallucinations, ——. <sup>13</sup> Delusions, ——. <sup>14</sup>

What treatment has been pursued? ——. <sup>15</sup> Whether patient has been restrained by muff, belt, or otherwise, —.

Diagnosis, —.

Name and address of correspondent, —. Telegraphic address, —. Relationship of correspondent to alleged insane person, —.

That the facts stated and information contained in this exhibit are true, to the best of my knowledge and belief. —, M. D.

Dated —, 19—. —, M. D.

Explanatory notes.—1 Or, City and County. 2 This must be filled out by at least two medical examiners, who should answer every question as fully as possible. 3 Name the place. 4 Or, city and county. 5 The state. 6 Whether illiterate, reads only, common school, academic, collegiate, or unknown. 7 Whether single, married, widowed, or divorced. 8 Cleanly or uncleanly. 9 If either homicide or suicide has been attempted or threatened, it should be so stated. 10 State what the alleged insane person said, if anything, in the presence of the examiners. 11 State what the alleged insane person did in the presence of the examiners, and also describe his or her appearance and manner. 12 State what, if any, significant change there has been in the alleged person's disposition, mental condition, business, or social habits, or bodily health. 13 Whether of sight, hearing, taste, or smell. 14 Character of; are they fixed, or changeable. 15 State remedies given, and whether given hypodermically or not.

§ 200. Form. Physicians' certificate of insanity.

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.]

— and —, being duly sworn, depose and say, and certify, each for himself, and not one for the other, That he is a duly qualified medical examiner; that, at the request and in the presence of the Honorable —, judge of the —<sup>2</sup> court in and for the county<sup>3</sup> of —, state of —, he has heard the testimony of the witnesses, and has carefully and personally examined the said — in

reference to the charge of insanity, in the manner and with the results set forth in the medical examination hereto annexed and marked "Exhibit A," and made a part hereof; and finds that said — is insane, and is so far disordered in his mind as to endanger health, life, person, and property, and that the condition of said — is such as to require care and treatment in a hospital or asylum for the care, custody, and treatment of the insane; that said testimony was taken in the presence of said insane person; that the insanity of said — is not a case of idiocy, imbecility, simple feebleness of mind, a case of acute mania a potu, of harmless chronic mental unsoundness, or of epilepsy.

—, M. D.

—, M. D.

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.<sup>4</sup>

**Explanatory notes.**—1 As, In the Matter of —, an Alleged Insane Person. 2 Title of court. 3 Or, city and county. 4 Or other officer taking the oath.

**§ 201. Form. Judgment of insanity and order of commitment of insane person.**

[Title of court.]

[Title of matter.]<sup>1</sup>

{ Department No. —.  
[Title of form.]

—, the person named in the affidavit of insanity now on file in this court, being this day brought before me, judge of the —<sup>2</sup> court of the county <sup>3</sup> of —, state of —, for a hearing and examination on a charge of insanity as set forth in the said affidavit, and said warrant of arrest and notice of said affidavit of insanity having been duly served on the said —, and said — having been made acquainted by me with the nature of said charge, and of his right to make a defense thereto and to produce witnesses thereto; and said matter coming on regularly for hearing in open court, said — being personally present, on this — day of —, 19—, in pursuance of an order of this court fixing the time and place

for hearing and examination of said — on said charge of insanity, duly entered in the minutes of the court, and a certified copy of said order having been duly served on said —, and — and — having been duly sworn and having testified as witnesses at said hearing, including — and —, medical examiners, whose certificate that said — is insane is hereto attached and marked "Exhibit A," said medical examiners having been present at the taking of the testimony of the other witnesses, and being satisfied from the testimony of the said witnesses and the matters set forth in said certificate that — is insane, and that it is dangerous to life, health, person, and property for said person to be at large, and that the condition of said person is such as to require care and treatment in a hospital or institution for the care, custody, and treatment of the insane;—

Now, therefore, said — is declared and adjudged to be insane, and it is ordered and directed that he be committed to the —, to be held in custody, cared for, and treated as an insane person.

It is further ordered and directed, That —, sheriff of the county<sup>4</sup> of —, state of —, take and convey said — to the — state hospital, to be held and confined therein, and cared for and treated as an insane person.

The sum of — dollars (\$—) having been found on the person of said — at the time of his arrest, the said sheriff, —, is ordered to take possession of the same and deliver it to the medical superintendent of said institution with said —.

Done in open court this — day of —, 19—.

—, Judge of the — Court.

[Seal] Attest: —, Clerk of the — Court.

By —, Deputy Clerk.

Explanatory notes.—1 As, In the Matter of —, an Alleged Insane Person. 2 Title of court. 3, 4 Or, city and county.

**§ 202. Form. Statement of financial ability.**

[Title of court.]

[Title of matter.]<sup>1</sup>{ Department No. —.  
[Title of form.]

As to the ability of said — to pay for his care and support at the hospital, I find, on diligent inquiry, that said — is possessed of real estate of the estimated value of — dollars (\$—), situated in the county <sup>2</sup> of —, state of —, and of the following description, to wit: —;<sup>3</sup> also the following described personal property, viz., —;<sup>4</sup> that the income from said property is as follows: —; and that said — is able to pay the sum of — dollars (\$—) per month for his care and support at the hospital. Name and address of guardian: —, residing at —, county <sup>5</sup> of —, state of —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> As, In the Matter of, etc. <sup>2</sup> Or, city and county.  
<sup>3</sup>, <sup>4</sup> Describe the property. <sup>5</sup> Or, city and county.

**§ 203. Form. Clerk's certificate as to papers.**

[Title of court.]

[Title of matter.]<sup>1</sup>{ Department No. —.  
[Title of form.]

State of —,  
County <sup>2</sup> of —, } ss.

I, —, county clerk and ex officio clerk of the —<sup>3</sup> court of the county <sup>4</sup> of —, state of —, hereby certify that the within and foregoing are the certificate of the physicians, judgment of insanity, and order of commitment, and statement of the judge in the matter of —, an insane person, committed on the — day of —, 19—, to the — state hospital by —, judge of the —<sup>5</sup> court, and I further certify that attached thereto are true copies of the affidavit of insanity, warrant of arrest, and order for the hearing and examination in said matter, the originals of the same being on file of record in my office.

Witness my hand and the seal of said court this — day of —, 19—.

[Seal]

By —, Deputy Clerk.

Explanatory notes.—1 As, In the Matter of —, an Alleged Insane Person. 2 Or, City and County. 3 Title of court. 4 Or, city and county. 5 Title of court.

**§ 204. Attendance and examination of witnesses.**

The superior judge may, for any hearing, issue subpoenas and compel the attendance of witnesses and must compel the attendance of at least two medical examiners, who must hear the testimony of all witnesses, make a personal examination of the alleged insane person, and testify before the judge as to the result of such examination, and to any other pertinent facts within their knowledge. The judge must also cause to be examined before him as a witness, any other person whom he has reason to believe has any knowledge of the mental condition of the alleged insane person or of his financial condition or that of the persons liable for his maintenance. The alleged insane person must be present at the hearing, and if he has no attorney, the judge may appoint an attorney to represent him.—*Kerr's Cyc. Pol. Code*, § 2169.

**§ 205. Certificate of medical examiners.**

If the medical examiners, after making the examination and hearing the testimony, believe such person to be dangerously insane, they must make a certificate, under their hand, showing as nearly as possible the facts as herein indicated, and in substantially the following form. (See § 199, ante.)—*Kerr's Cyc. Pol. Code*, § 2170.

**§ 206. Order of commitment.**

The judge, after such examination and certificate made, if he believes the person so far disordered in his mind as to endanger health, person, or property, must adjudge him insane, and make an order that he be confined in a



hospital for the care and treatment of the insane, designated in such order, and the order must be accompanied by a written statement of the judge as to the financial condition of the insane person and of the persons legally liable for his maintenance, as far as can be ascertained. Such order and statement shall be in the following form. (See § 201, ante.)

**DUTY OF COUNTY CLERK.**—Copies of such order, of the certificate of the examiners and of such accompanying statement must be filed with the county clerk, and said order must be recorded by the county clerk of the county in which such order was made as are other judgments of said court. He shall also keep, in convenient form, an index-book, showing the name, age, and sex of the person so ordered to be confined in any such hospital, with the date of the order and the name of the hospital in which the person is ordered to be confined.

**FEES.**—No fees must be charged by the clerk for performing any of the duties provided for in this section.—*Kerr's Cyc. Pol. Code*, § 2171.

**§ 207. Execution of the order of commitment.**

The insane person, together with certified copies of the affidavit, warrant of arrest, and of the order for hearing and examination, the order and accompanying statement of the judge and the certificate of the physicians, must be delivered to the sheriff of the county, and by him must be delivered to the officer in charge of the hospital to which such person is committed; but no female insane person shall be taken to any hospital without the attendance of some other female or of some relative of such insane person.—*Kerr's Cyc. Pol. Code*, § 2172.

**§ 208. Right to refuse to receive person committed.**

The superintendent or person in charge of any state hospital may refuse to receive any person upon any order, if the papers presented do not comply with the

provisions of the preceding section.—*Kerr's Cyc. Pol. Code*, § 2173.

**§ 209. Jury trial.**

If a person ordered to be committed, or any friend in his behalf, is dissatisfied with the order of the judge committing him, he may, within five days after the making of such order, demand that the question of his sanity be tried by a jury before the superior court of the county in which he was committed. Thereupon that court must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial.

**PROCEDURE.**—At such trial the cause against the alleged insane must be represented by the district attorney of the county, and the trial must be had as provided by law for the trial of civil causes before a jury, and the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury.

**COMMITMENT.**—If the verdict of the jury is that he is insane, the judge must adjudge that fact and make an order of commitment as upon the original hearing. Such order must be presented, at the time of commitment of such insane person, to the superintendent or person in charge of the hospital to which the insane person is committed, and a copy thereof be forwarded by such superintendent to the commission, and filed in its office.

**STAY OF PROCEEDINGS.**—Proceedings under the order must not be stayed, pending the proceedings for determining the question of sanity by a jury, except upon the order of a superior judge, with provision made therein for such temporary care and custody of the alleged insane person as may be deemed necessary.

**BOND FOR APPEARANCE.**—If the superior judge, by the order granting the stay, commits the accused insane to the custody of any person other than a peace officer, he may, by such order, require a bond for his appearance at the

trial. If a judge refuses to grant an application for an order of commitment of an insane person alleged to be dangerous to himself and others if at large, he must state his reasons for such refusal, and any person aggrieved thereby may demand a trial of the question of the insanity of such accused insane, in the manner hereinbefore provided for a jury trial when demanded by or on behalf of the accused insane.—*Kerr's Cyc. Pol. Code*, § 2174.

**§ 210. Habeas corpus.**

Any one in custody as an insane or incompetent person is entitled to a writ of habeas corpus, upon a proper application made by the commission, by such person, a relative or friend in his behalf to the superior judge of the county in which the hospital is located. Upon the return of such writ, the fact of his insanity or incompetency must be inquired into and determined. The medical history of such person as it appears in the clinical records, must be given in evidence, and the superintendent in charge of the state hospital wherein such person is held in custody, and any other person, must be sworn touching the mental condition of such person.—*Kerr's Cyc. Pol. Code*, § 2188.

**§ 211. State hospitals, discharge of patients from.**

The superintendent of a state hospital on filing his written certificate with the secretary of board of managers, may discharge any patient, except one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding arising out of a criminal action or proceeding arising out of a criminal offense, at any time, as follows:

A patient who, in his judgment, has recovered;

Any patient who is not recovered, but whose discharge, in the judgment of the superintendent, will not be detrimental to the public welfare, or injurious to the patient.

**SUPERINTENDENT MAY REFUSE TO DISCHARGE.**—The medical superintendent may, when he deems it advisable, refuse to discharge any patient as improved, unless the guardian, friends, or relatives of such patient shall satisfy such medical superintendent that they are financially able and willing to properly care for such patient after his discharge.

**SUPERIOR JUDGE MAY ORDER DISCHARGE.**—When the superintendent is unwilling to certify to the discharge of an unrecovered patient, upon request, and so certifies in writing, giving his reasons therefor, any superior judge of the county in which the hospital is situated may, upon such certificate, and an opportunity of hearing thereon being accorded the superintendent, and upon [such] other proofs as may be produced before him, direct, by order, the discharge of such patient, upon such security to the people of the state as he may require for the good behavior and maintenance of the patient.

The certificate and the proof, and the order granted thereon, must be filed in the clerk's office of the county in which the hospital is situated, and a certified copy of the order in the hospital from which the patient is discharged.

**PAROLE OF PATIENT.**—The superintendent may grant a parole to a patient, not exceeding thirty days, under general conditions prescribed by the commission.

**PATIENTS CHARGED WITH CRIME.**—A patient committed to a hospital under the provisions of chapter six, title ten, part two, of the Penal Code, must, upon the certificate of the superintendent that such person has recovered, approved by the superior judge of the county from which the patient was committed, be redelivered to the sheriff of such county, and dealt with as provided for by said chapter six of the Penal Code.

**DISCHARGE OF PATIENT ON ORDER OF COMMISSION. RETURN TO COUNTY.**—The medical superintendent of a state hospital may on his own motion, and must on the order of

the commission, discharge any patient who is not insane, or because he is not a proper case for treatment therein, or because such patient is a case of idiocy, imbecility, chronic harmless mental unsoundness or acute mania a potu. Such person, when discharged, shall be returned to the county from which he was committed at the expense of said county. When such person is a poor and indigent person he shall be delivered to the sheriff of the county who must take the necessary steps for the care of such person.

When such person is a poor and indigent person he shall be cared for by such county as are other indigent poor.

**CONDITIONS ON RECOMMITMENT.**—When any person is discharged from any state hospital as is last herein provided he shall not be again committed to any state hospital for the insane unless permission for such recommitment be first obtained from the medical superintendent thereof. Said medical superintendent shall refuse to receive such person on such recommitment unless such permission is obtained as herein provided.

**CERTIFICATE OF DISCHARGE TO BE FILED. RECORDING.**—When any person is discharged as recovered from a state hospital a copy of the certificate of discharge duly certified by the secretary of the board of managers, may be filed for record with the clerk of the superior court of the county from which said person was committed. The clerk shall record the same in a book kept for that purpose and shall keep an index thereof. No fees shall be charged by the clerk for performing such duties.

**COPY OF CERTIFICATE AS EVIDENCE.**—Such certified copy of such certificate and the record of the same shall have the same legal effect as the original, and if no guardian has been appointed for such person as provided by sections seventeen hundred and sixty-three and seventeen hundred and sixty-four of the Code of Civil Procedure,

such certificate, duly certified copies thereof and such record thereof shall have the same legal force and effect as a judgment of restoration to capacity made under the provisions of section seventeen hundred and sixty-six of the Code of Civil Procedure.

**"PATIENT" DEFINED.**—The term patient as used in this section shall be regarded as referring to and including inmates of the home for the feeble-minded.

**APPLICATION TO BE DECLARED SANE.**—Whenever any person duly adjudged to be insane has been duly committed to a state hospital for the insane under the provisions of any law of this state, and for whom no guardian has been appointed, and who is absent from the hospital to which he was committed or transferred under the order of commitment, on parole or leave of absence granted by the medical superintendent thereof, or who has been discharged therefrom as improved by said superintendent as provided by this section, is desirous of being declared sane and restored to legal capacity, said insane person or a relative or friend on his behalf may make application in writing to said medical superintendent to be declared sane. On receiving such application, said medical superintendent may make such examination of such person and require such proof as he may reasonably deem necessary to determine whether or not such person is sane. For the purpose of making such examination said superintendent may also require said person to present himself at the hospital for examination. If on making such examination and receiving such proofs as he deems reasonably necessary said medical superintendent shall be satisfied that said person is sane and has recovered his reason, said medical superintendent shall issue to said person his certificate that such person is sane and recovered and restored to reason. A copy thereof, duly certified, shall be immediately forwarded to the state commission in lunacy, who shall file the same in their

office. A copy thereof shall also be filed at said hospital and a proper record made thereof.

**APPLICATION WHERE SUPERINTENDENT REFUSES TO ISSUE CERTIFICATE.**—If said medical superintendent is unwilling or refuses, however, to issue a certificate of recovery upon application as in this section provided, he shall so certify in writing, giving his reasons therefor, and said insane person or a relative or friend in his behalf may make application by petition duly verified to a judge of the superior court of the county where such insane person resides to be declared sane. Notice of the hearing of said application shall be given in the manner directed by a judge of said court to said medical superintendent, and to such relative or relatives of such insane person residing in the county as the judge may direct, who may have opportunity to appear and be heard on the hearing of said application. Such hearing shall be conducted as are civil cases, and on demand of the petitioner the question of the insanity of such person may be tried by a jury, as in civil cases. If on the hearing of said application the court is satisfied from the proofs produced or if a jury trial is had, and the jury shall render a verdict that such person is sane, the court shall by order adjudge such person to be sane. Said order shall be filed and recorded in the office of the county clerk and certified copies thereof shall be sent by said clerk and filed with the state commission in lunacy and also with the superintendent of the hospital from which said insane person was paroled, granted leave of absence, or discharged as improved. If said matter is tried by a jury the cause against said insane person shall be represented by the district attorney of the county. From a decision of the court or verdict of the jury finding the said person insane an appeal may be taken as in civil cases. If three-fourths of the jury fail to declare said person sane, or the court or the jury shall find such person to be insane, said proceeding shall

be dismissed and no new application to declare such person sane shall be made for six months thereafter.

**HEARING. TRIAL BY JURY.**—Whenever any person who has been adjudged to be insane, who has not been committed to a state hospital for the insane, and who has no guardian, is desirous of being declared sane and restored to legal capacity, said insane person or a relative or friend on his behalf may, by petition duly verified, make application to a judge of the superior court where he resides to be declared sane; said judge shall fix a time for the hearing of said application, and he may, by order, direct that notice of said hearing be given in the manner and to such relative or relatives of said person residing in the county where such application is made, as the judge may direct, who shall have opportunity to appear and be heard at said hearing. Such hearing shall be conducted as are civil cases, and on demand by the petitioner may be tried before a jury as are civil cases. If on said hearing the decision of the court or the verdict of the jury is that such person is insane, an appeal may be taken to the supreme court as in civil cases. If the court shall decide or the jury shall render a verdict declaring said person to be sane, the court shall make an order declaring said person to be sane. If three-fourths of the jury fail to unite in a verdict, or the court or jury shall decide that such person is insane, such proceeding shall be dismissed, and no new application to have such person declared sane shall be made for six months thereafter.

**COSTS.**—Before any order is made or any proceedings are taken for a trial by jury, the person demanding the same shall make a deposit, or give a bond, to be approved by a judge of the superior court where proceedings are had for the payment of all costs of such trial, unless, in the opinion of said judge, the insane person in whose behalf said trial is demanded is a poor or indigent person.



**PRIMA FACIE EVIDENCE OF SANITY.**—The certificate of recovery by the medical superintendent, the order of the judge or the verdict of a jury and the order of the judge as in this section provided, shall have the same legal effect as a discharge as recovered, and shall be prima facie evidence of the sanity of such person.—*Kerr's Cyc. Pol. Code*, § 2189.

**§ 212. Powers of persons, whose incapacity has been adjudged, after restoration to reason.**

After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract nor delegate any power or waive any right, until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge.—*Kerr's Cyc. Civ. Code*, § 40.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Idaho\*—Compiled Statutes of 1919, section 4590.

Montana\*—Revised Codes of 1907, section 3597.

North Dakota—Compiled Laws of 1913, section 4345.

Oklahoma—Revised Laws of 1910, section 890.

South Dakota—Compiled Laws of 1913, section 2521.

**§ 213. Contracts by persons without understanding.**

A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family.—*Kerr's Cyc. Civ. Code*, § 38.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Idaho—Compiled Statutes, section 4588.

North Dakota—Compiled Laws of 1913, section 4343.

Oklahoma—Revised Laws of 1910, section 888.

South Dakota\*—Compiled Laws of 1913, volume II, page 3, section 2519.

Note.—For provisions in other states relative to the same subject-matter covered by sections 2167-2189 of the Political Code of California, see the following table.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, sections 830-832a.

Arizona—Revised Statutes of 1913, paragraphs 1199-1293.

Colorado—Mills's Statutes of 1912, sections 4690-4727; Laws of 1915 chapter 118, page 336, repealing sections 4690, 4692, 4693, 4694, 4695 and 4705, of Mills's Ann. Stats., Rev. Ed. 1912.

Idaho—Compiled Statutes of 1919, section 4589.

Kansas—General Statutes of 1915, sections 9593-9628.

Montana—Revised Codes of 1907, sections 1111-1147; Supp. of 1915, pages 207-212, sections 1111-1147k.

Nevada—Revised Laws of 1912, sections 2195-2212; and Statutes of 1913, chapter 52, page 38.

New Mexico—Statutes of 1915, sections 3378-3410.

North Dakota—Compiled Laws of 1913, section 4474.

Oklahoma—Laws of 1915, chapter 275, page 526; Laws of 1917, chapter 174, page 309.

Oregon—Laws of 1913, chapter 242, page 679.

South Dakota—Compiled Laws of 1913, sections 2179-2198; Laws of 1916-17, chapter 266, page 446.

Utah—Compiled Laws of 1907, sections 2168-2176.

Washington—Remington's 1915 Code, sections 5953-5970.

Wyoming—Compiled Statutes of 1910, sections 448-481.

**§ 214. By persons of unsound mind.**

A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code.—*Kerr's Cyc. Civ. Code*, § 39.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Idaho—Compiled Statutes, section 4589.

North Dakota—Compiled Laws of 1913, section 4344.

Oklahoma—Revised Laws of 1910, section 889.

South Dakota\*—Compiled Laws of 1913, volume II, page 3, section 2520.

**Note.**—The commitment of incompetents, other than insane persons, is provided for by the Political Code of California, § 2192. For provisions in other states relative to the incompetent and feeble-minded, see the following table.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

**Colorado**—Mills's Statutes of 1912, sections 2867-2875; Laws of 1915, chapter 118, page 336, repealing sections 4690, 4692, 4693, 4694, 4695, and 4705, of Mills's Ann. Stats., Rev. Ed. 1912.

**Idaho**—Compiled Statutes of 1919, section 1187.

**Kansas**—General Statutes of 1915, sections 9671-9688.

**Montana**—Revised Codes of 1907, section 1171, as amended in 1909. See Supp. of 1915, page 212.

**Nevada**—Revised Laws of 1912, sections 5726, 6162-6186.

**New Mexico**—Statutes of 1915, sections 3378-3410.

**North Dakota**—Compiled Laws of 1913, section 1714, as re-enacted by Laws of 1917, chapter 143, page 207.

**Oklahoma**—Revised Laws of 1910, sections 7067, 7081.

**South Dakota**—Compiled Laws of 1913, volume I, page 146, section 552, and pages 147-149, sections 558-564.

**Washington**—Remington's 1915 Code, sections 8974—1 to 8974—5 (state humane bureau).

#### § 214.<sup>1</sup> Arrest, hearing and commitment of inebriates and drug habitues.

Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that any person is so far addicted to the intemperate use of narcotics as to have lost the power of self-control, or is subject to dipsomania or inebriety, he must issue and deliver to some peace officer for service a warrant directing that such person be arrested and taken before a judge of the superior court for a hearing and examination on such charge. Such officer must thereupon arrest and detain such person until a hearing and examination can be had. At the time of the arrest a copy of said affidavit and warrant of arrest must be personally delivered to said person. Such affidavit and warrant of arrest must be substantially in the form provided by section two thousand one hundred sixty-eight of the Political Code for the arrest of a person charged with insanity. He must be taken before a judge of the superior court, to whom said

affidavit and warrant of arrest must be delivered to be filed with the clerk. The judge must then inform him of the charge against him, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto. The judge must by order fix such time and place for the hearing and examination in open court as will give a reasonable opportunity for the production and examination of witnesses. Such order must be entered in the minutes of the court by the clerk and a certified copy of same served on such person. The judge may also order that notice of the arrest of such person and the hearing of the charge be served on such relatives of said person known to be residing in the county, as the court may deem necessary or proper. The hearing and examination shall be had in compliance with the provisions of sections two thousand one hundred and sixty-nine and two thousand one hundred and seventy of the Political Code. The judge, after such hearing and examination, if he believes the person is so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control, or is subject to dipsomania or inebriety, must make an order that he be confined in a hospital for the care and treatment of the insane, designated in such order, and the order must be accompanied by a written statement of the judge as to the financial condition of the patient, and of the person legally liable for his maintenance, as far as can be ascertained; provided, that before a person shall be committed to a state hospital, satisfactory evidence shall be submitted to the trial judge showing that the person to be committed is not of bad repute or bad character, apart from his or her habit for which the commitment is made, and that there is reasonable ground for believing that the person, if committed, will be permanently benefited by treatment; and provided, further, that no person who has heretofore been committed under the provisions of

this section as an intemperate user of narcotics, and who has been discharged or has escaped, shall be again committed to any state hospital unless permission for such recommitment be first obtained from the medical superintendent thereof. Such order and statement shall be in substantially the form provided by section two thousand one hundred and seventy-one of the Political Code for the commitment of insane persons. The court shall commit such person for a definite period, not to exceed two years; but provided that he may be paroled by the medical superintendent under the same rules and condition that the insane are paroled; and provided further that the state commission in lunacy shall be given the same power to discharge any person committed under this act as contained in section two thousand one hundred and eighty-nine of the Political Code, upon the recommendation of the hospital superintendent, when satisfied that such person will not receive substantial benefit from further hospital treatment. Such person shall be delivered to the state hospital for the insane to which he has been committed in compliance with the provisions of section two thousand one hundred and seventy-two of the Political Code, providing for the commitment and deliverance of an insane person.—*Kerr's Cyc. Pol. Code*, § 2185c.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Hawaii—Laws of 1915, Act 187, page 256.

Idaho—Compiled Statutes of 1919, section 1191.

Kansas—Laws of 1917, chapter 165, page 212 (appointment of guardian).

Montana—Laws of 1911, chapter 139, page 398. See Supp. of 1915, pages 209, 210, sections 1147a-1147k.

Oklahoma—Revised Laws of 1910, sections 3364-3367.

COMMITMENT AND DISCHARGE OF INSANE PERSONS.

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| <p>1. Examination and commitment.</p> <p>(1) In general.</p> <p>(2) Jurisdiction. Distinction.</p> <p>(3) Statutory provisions.</p> <p>(4) Notice, and opportunity to be heard.</p> <p>(5) Evidence.</p> <p>(6) Adjudication of insanity.</p> <p>(7) Setting commitment aside.</p> <p>(8) Commitment papers as evidence.</p> <p>2. Collateral attack.</p> <p>3. Support, maintenance, and custody.</p> <p>(1) Liability of estate.</p> <p>(2) Suit by directors of asylum.</p> <p>(3) Unauthorized order as to custody.</p> | <p>4. Contracts and rights of insane persons.</p> <p>(1) In general.</p> <p>(2) Contract of conveyance. Deed. Mortgage.</p> <p>5. Actions.</p> <p>(1) In general.</p> <p>(2) Suit to set deed aside.</p> <p>6. Restoration to capacity. Discharge.</p> <p>(1) Distinction.</p> <p>(2) Purpose of statute.</p> <p>(3) Power to discharge. Habeas corpus.</p> <p>(4) Power to discharge. "Patient."</p> <p>(5) Power to discharge. Effect of discharge.</p> <p>(6) Conclusiveness of discharge.</p> |
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1. Examination and commitment.

(1) In general.—The residence of one who has strayed away, and for inquiring into the sanity of whom a petition is filed, has two necessary elements: (1), the presence of the person in the place, previous to the straying; and (2), his intention to live there.—*White's Guardian v. Martin*, 2 Alaska 495, 500.

(2) Jurisdiction. Distinction.—The jurisdiction of a court to appoint guardians for insane persons is wholly independent of its jurisdiction to commit to hospitals for the insane.—*Donaldson v. Winningham*, 48 Wash. 374, 125 Am. St. Rep. 937, 93 Pac. 534, 535. The power of the superior courts or the judges thereof to examine or try and to commit insane persons to the hospitals for the insane maintained by the state, is derivable alone from legislative enactments.—*Application of Harcourt*, 27 Cal. App. 642, 643, 150 Pac. 1001.

(3) Statutory provisions.—A statute which provides for the examination and commitment and custody of persons charged and found to be insane is not necessarily unconstitutional, though it may be imperfect in some of its protective requirements.—*Territory v. Sheriff of Gallatin County*, 6 Mont. 297, 12 Pac. 662. The statute relating to the commitment of persons as being insane has no reference to persons under sentence of imprisonment for crime; for such persons are already in the custody of the law so as not to menace the safety of themselves or others.—*State v. Peterson*, 90 Wash. 479, 156 Pac. 542. The authority given by statute to the commissioner, to appear as next friend for and to prosecute an action for defectives, is limited to such persons as are inmates of a public institution maintained and operated by the state, county, city, or municipality.—*Matthews v. Rucker* (Okla.), 170 Pac. 492. Irrespective of statute, a court having general jurisdiction

over insane persons has inherent power to discharge or to commit an insane person; and that power is not affected by the repeal of a statute, authorizing the discharge of an insane person upon recovering his reason.—*State (ex rel. Martin) v. Superior Court*, 101 Wash. 81, 94, 4 A. L. R. 572, 172 Pac. 257.

(4) Notice, and opportunity to be heard.—An inquiry and trial in the probate court, had upon an information charging one with being a person of unsound mind and incapable of managing his own affairs, should be had only after notice to the person alleged to be insane, and after an opportunity has been given such person to be present at the trial, in person or by counsel. An adjudication of insanity which is made without such notice and opportunity to be heard is a nullity and void; and a commitment thereunder to the insane asylum would therefore be illegal.—*In re Wellman*, 3 Kan. App. 100, 45 Pac. 726. The authorities of an asylum are not vested with power to commit a person thereto, nor to confine him there against his consent, without the legal inquiry provided by law, except, perhaps, temporarily, in the case of one violently and dangerously insane, until the necessary proceedings can be had, to avoid the injury which might be reasonably expected to occur if the party was allowed to be at large. Generally, it is permissible, without warrant or express authority, to confine temporarily a person disposed to do mischief to himself or another person, until the proper proceedings can be instituted to have the question of his insanity determined. In such a case the restraint becomes necessary and proper, both for the safety of the party himself and for the preservation of the public peace.—*Byers v. Solier*, 16 Wyo. 232, 14 L. R. A. (N. S.) 468, 93 Pac. 59, 65. But where a patient, who is not violently or dangerously insane, has been unconditionally discharged by competent authorities of the hospital, he can not be reincarcerated without another judicial inquiry; and the person charged with insanity or other mental infirmity has the same legal right as any other citizen to claim the benefit of constitutional and statutory provisions affecting his personal liberty. He is therefore, if legally confined in an asylum, and in actual custody, entitled to a writ of habeas corpus.—*Byers v. Solier*, 16 Wyo. 232, 14 L. R. A. (N. S.) 468, 93 Pac. 59, 64. The right to appear at an inquisition in lunacy must be preserved, and an opportunity afforded to do so, in person or by counsel, as far as the circumstances will permit, though actual appearance at the trial is, of course, not necessary, as there are many cases in which the parties are so mentally disordered that they can not appear.—*In re Wellman*, 3 Kan. App. 100, 45 Pac. 726, 727. The notice, of hearing, required by statute to be given a person whose sanity is petitioned to be inquired into, may be served by any suitable process or method of proceeding which may appear most conformable to the spirit of the code, personal service being

preferable, if it can be secured.—*White's Guardian v. Martin*, 2 Alaska 495, 501.

#### REFERENCES.

Commitment of insane persons, due process of law in.—See note 1 Am. & Eng. Ann. Cas. 733.

(5) Evidence.—When the fact of insanity is established in the case of a property owner, the court will, to protect such owner's estate from forfeiture by reason of an alleged abandonment, conclusively presume that his unexplained absence therefrom results from his insane delusions, and not from any sane or rational intention to abandon it.—*White's Guardian v. Martin*, 2 Alaska 495, 503. Abandonment of property by the owner or occupant can not be established by proof merely that such owner or occupant left the premises vacant, but it must be shown that he had intention to reclaim them; an insane person can have no intention; hence, the proof that such a person left property and meant not to reclaim it must be very strong.—*White's Guardian v. Martin*, 2 Alaska 495, 502.

(6) Adjudication of Insanity.—An adjudication of insanity, under a law, the purpose of which is to provide a procedure whereby a judicial determination may be had as to whether or not the person being examined is a proper subject to become a patient in the state hospital for the insane, does not conclusively show that the person therein named is a lunatic or mentally unfit to answer, or to make defense to a criminal charge against him.—*Ex parte Wright*, 74 Kan. 406, 89 Pac. 678. In proceedings for the commitment of a person alleged to be insane, the verdict of the jury declaring such person to be of unsound mind, incapable of caring for himself, and unsafe to be at large, is a sufficient "certificate under oath" that the charge of insanity is correct.—*State v. Third Judicial Dist. Court*, 17 Mont. 411, 43 Pac. 385, 386. Where the statute prescribes a specific test determinative of the question of insanity, that is to say, a finding of a specifically defined character of insanity or mental derangement to authorize or justify commitment to a public hospital for the insane, the evidence and the findings must measure up to such test, and sustain the conclusion of the existence of such form of insanity, otherwise, even though the patient may not be wholly of sound mind, the order of commitment will be without jurisdiction and in excess of the legal authority of the court or judge making it.—*Application of Harcourt*, 27 Cal. App. 642, 643, 150 Pac. 1001. Construing the Oregon statute, defining an "insane person," with the act of 1913, authorizing inquests by the county court to determine the question of sanity in individual cases, and whether the individual should be allowed to remain at large, makes it apparent that there are recognized degrees of mental weakness, and that a commitment to the asylum is authorized only in cases where the individual is unsafe to be at large, or is suffering from exposure and neglect.—*In re Sneddon*, 76 Or. 470,



149 Pac. 527. A next friend or guardian ad litem may be appointed for a person who, though not insane, is alleged to be weak minded and, because of the undue influence and domination of another, is not a free agent; but where an issue is raised by the party's denial of such weak mindedness and undue influence, that issue must be heard and determined in limine and before further steps are taken in the suit.—*Kalaniana'ole v. Liliuokalani*, 23 Haw. 457, 468. While the evidence and the findings of the medical examiners and the court or judge must conform to the test prescribed by the statute to justify an adjudication of insanity, it is not necessary that a finding or conclusion from the evidence should be in the precise language of the statute, and if such finding is clearly expressed, and shows that the patient is so disordered in mind as to endanger life, health, person, or property, and for that reason is dangerous to be at large, it is sufficient to support the adjudication and commitment.—*Application of Harcourt*, 27 Cal. App. 642, 645, 150 Pac. 1001. Where the certificates of the medical examiners and the findings of the court or judge making the examination show that the patient was so far disordered in mind as to "possibly" endanger health, person, and property, and that it is dangerous for life, health, person, or property for such person to be at large, and that the condition of such person is such as to require care and treatment in a hospital for the care and treatment of the insane, an order of commitment of an alleged insane person does not meet the requirements of the statute, and is without legal authority.—*Application of Harcourt*, 27 Cal. App. 642, 645, 150 Pac. 1001.

(7) *Setting commitment aside.*—Proceedings had under the statute providing for bringing before the court persons deemed, by reason of insanity, unsafe to be at large, may at any time afterward be expunged if the record is void on its face; but, if the judgment is merely irregular, the remedy is by special appeal or review; the fact that the sheriff had no warrant when he took the committed person into custody and that the judge had such person brought before him only on his verbal order would not render the order of commitment void.—*Springer v. Steiner*, 91 Or. 100, 178 Pac. 592. A court that has made an order committing an alleged lunatic to an asylum can not, on the latter's application two years thereafter, set aside the commitment proceedings, unless the record is found to be wholly void.—*Springer v. Steiner*, 91 Or. 100, 178 Pac. 592. In a proceeding on a writ of certiorari to rescind an order committing the relator as an insane person, it is no ground for a reversal of the commitment that the venire for the jury did not expressly direct that one of the jurors to be summoned should be a practicing physician, where a jury with the proper qualifications was in fact summoned.—*Estate v. Third Judicial Dist. Court*, 17 Mont. 411, 43 Pac. 385.

(8) *Commitment papers as evidence.*—Where a person was sent to an insane asylum, the commitment papers are, in a subsequent

action by such person, competent to prove his insanity from the time of his commitment until his discharge as cured, but they are not competent to prove his insanity at any other time.—*Roberts v. Pacific T. & T. Co.*, 93 Wash. 274, 160 Pac. 965.

**2. Collateral attack.**—If a court has power conferred upon it to hold an examination and to determine the question of insanity, and to commit to an asylum, its orders, made by virtue of such authority and that of jurisdiction, are not subject to collateral attack.—*Napa State Hospital v. Dasso*, 153 Cal. 698, 15 Ann. Cas. 910, 18 L. R. A. (N. S.) 643, 96 Pac. 355, 356.

### **3. Support, maintenance, and custody.**

**(1) Liability of estate.**—The statute which authorizes a recovery from the estates of insane persons confined in state hospitals, for the support of such persons, is not unconstitutional.—*Napa State Hospital v. Dasso*, 153 Cal. 698, 15 Ann. Cas. 910, 18 L. R. A. (N. S.) 643, 96 Pac. 355. The estate of an insane person may be charged with the expense of his maintenance and necessities furnished him without an express promise, either by the insane person or guardian, to pay therefor.—*Palmer v. Hudson R. S. Hospital*, 10 Kan. App. 98, 61 Pac. 506. An insane person is liable for the reasonable value of things furnished to him, necessary for his support. This was so at common law, when the necessities were furnished by an individual; and there seems to be no reason why the same rule should not apply to a state hospital for the insane, which does and furnishes for the insane person only those things required by the law of the state.—*State Commission in Lunacy v. Eldridge*, 7 Cal. App. 298, 94 Pac. 597, 600. If, however, the estate of the insane person was not sufficient to any extent to provide for his maintenance at the time of his commitment to the asylum, such property, existing at the time of his commitment, as he possessed belonged to the creditors, and the state has no legal claim against the insolvent estate of such insane person for his maintenance.—*Estate of Callen*, 152 Cal. 769, 93 Pac. 1011.

**(2) Suit by directors of asylum.**—Where, by statute, it is provided that in case an insane person is able to pay actual charges and expenses, a guardian may be appointed, whose duty it shall be to pay such expenses to the board of directors of the insane asylum, and that "if indigent insane persons have kindred of degree of husband or wife, father, mother, or children, living within this state, of sufficient ability, who are otherwise liable, said kindred shall support such indigent insane person to the extent prescribed for paying such patients," the board has power to collect a debt due the directors from the husband of an inmate of the asylum; and the directors have capacity to sue, on the ground that they are trustees of an express trust.—*Watt v. Smith*, 89 Cal. 602, 26 Pac. 1071, 1072.

(3) **Unauthorized order as to custody.**—Under a law requiring that a female patient shall be accompanied, in the absence of some member of her family, by a female attendant in being conducted to the state insane asylum, an order of the county court committing such patient to the sheriff of the county for custody is not unauthorized, where the statute makes no requirement as to custodian when the person is retained in custody in the county of her commitment.—*Board of Commissioners v. Adams*, 16 Colo. App. 513, 66 Pac. 683, 684.

#### REFERENCES.

Establishment of asylums for the insane.—See *Henning's General Laws of California*, page 764, chap. 244.

#### 4. Contracts and rights of insane persons.

(1) **In general.**—Capacity to make a contract is not determined by whether one has much or little intellect; the true test is, whether the party who seeks to avoid the contract on the ground of incapacity by reason of alleged insanity, had sufficient mental capacity to know the nature of the contract and the terms thereof; if he had, he may be required to perform it.—*Westerland v. First Nat. Bank*, 38 N. D. 24, 164 N. W. 323. Mere weak-mindedness, whether natural or produced by old age, sickness, or other infirmity unaccompanied by any other inequitable incidents is, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance.—*Loman v. Paullin*, 51 Okla. 294, 152 Pac. 73. An executed contract for the sale of land, made by a weak-minded, ignorant, and even insane person, without fraud, or notice to the vendee of the grantor's insanity, and for a fair consideration, will not be set aside, either in law or in equity, in favor of the vendor or his representatives, unless the purchase money be restored, and the parties fully reinstated to the condition in which they were prior to the purchase.—*Loman v. Paullin*, 51 Okla. 294, 152 Pac. 73. A person acquitted of murder because of being insane when perpetrating the act, and who, as an insane criminal has been thereupon committed to the state asylum for dangerous lunatics, has his status judicially established and must be shown, in the manner provided by law, to be no longer dangerous in order to be entitled to his liberty.—*Ex parte Ostatter*, 103 Kan. 487, 175 Pac. 377.

(2) **Contract of conveyance. Deed. Mortgage.**—A contract of conveyance, made by one who has been adjudged a lunatic, but who was in fact sane when the contract of conveyance was made, is valid, although no adjudication has been made that he has been restored to his right mind.—*Lower v. Schumacher*, 61 Kan. 625, 60 Pac. 538, 539; *Water-Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715. Prior to the decision of these cases it had been held in Kansas that the

deed to the homestead of an insane person, executed by him and his wife after he had been duly adjudicated insane and placed under guardianship, and a record thereof duly made in the probate court, while he was out on a temporary leave of absence, after having been confined in the insane asylum, was void, and conveyed no title to the purchaser; that a mortgagee of the grantee in such a deed, having actual notice of such insanity, and such adjudication by the probate court, acquired no lien on the land; and that a mortgage on the homestead of an insane person, executed by his wife and guardian without any order of the probate court, was absolutely void.—*Loan and Trust Co. v. Spitler*, 54 Kan. 560, sub nom. *New England L. & T. Co. v. Spitler*, 38 Pac. 799. An adjudication that a person is insane does not make void a deed afterwards executed by him, where he had no notice of the proceeding, and no guardian was appointed to take charge of his property.—*Hawaiian T. & I. Co. v. Barton*, 16 Haw. 294, 301.

#### 5. Actions.

(1) *In general.*—A person who has been adjudged insane, and who is under guardianship, can not conduct litigation without the supervision, control, and protection of his guardian; and, when it clearly appears that a person who has been adjudged insane is the plaintiff in an action, and that he is seeking to maintain that action independently of his guardian and without the approval of the latter, the action should be dismissed.—*Linderholm v. Walker*, 102 Kan. 684, 171 Pac. 603. If the petition, in an action instituted by the commissioner of charities and corrections, as next friend for a defective person, to cancel a guardian's deed, to quiet title, and to recover possession of real estate, falls to allege that the defective was an inmate of a public institution maintained and operated by the state, county, city, or municipality, it does not state a cause of action and is subject to demurrer.—*Matthews v. Rucker* (Okla.), 170 Pac. 492. The fact that the proprietor of a building is an insane person under guardianship does not relieve him or her from liability in an action for damages brought by a passenger in an elevator, operated in the building, who has, in the fall of the elevator, resulting as inferred from the negligent operation thereof, received personal injuries.—*Campbell v. Bradbury*, 179 Cal. 364, 176 Pac. 685. Evidence that, at a point of time four years or more subsequent to the time of making a contract, the one who made such contract was adjudged insane by a board of insanity, is inadmissible and incompetent in an action brought by him to recover money paid on such contract on the ground that he was at the time insane, such evidence is too remote to prove his mental condition at the time of making of the contract.—*Westerland v. First Nat. Bank*, 38 N. D. 24, 164 N. W. 323.

(2) *Suit to set deed aside.*—If a lunatic has executed and delivered a deed, and the transaction was fair and reasonable, and based upon a

valid consideration—there being no fraud, no circumvention, over-reaching or undue advantage taken of the grantor's mental condition, and if the contract was made in good faith, and was fair for the grantor's benefit and best interest, the deed should be sustained.—*Green v. Hulse*, 57 Colo. 238, 243, 142 Pac. 416. Deeds of persons, in fact insane but not so adjudged, are voidable but not absolutely void.—*Green v. Hulse*, 57 Colo. 238, 243, 142 Pac. 416. There must be some occasion or reason for pronouncing a voidable deed void, and the party assailing it must have a right to bring the suit.—*Green v. Hulse*, 57 Colo. 238, 244, 142 Pac. 416. In a suit to set aside a deed, voidable as being the act of a lunatic, the trial court should hear evidence as to the facts and circumstances connected with the transaction, and the conditions under which it was made, so as to determine its validity, or whether the plaintiff was precluded from bringing suit.—*Green v. Hulse*, 57 Colo. 238, 243, 142 Pac. 416.

#### REFERENCES.

Liability of lunatic for tort.—21 Ann. Cas. 1352.

#### 6. Restoration to capacity. Discharge.

(1) **Distinction.**—The statutory proceeding for the restoration of an insane or incompetent person to capacity is applicable only to those for whom guardians have been appointed, and does not apply to persons committed to state hospitals for the insane without having been put under guardianship.—*Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900, 902.

(2) **Purpose of statute.**—The legislature of California, in enacting section 2189 of the Political Code, doubtless intended to afford to persons who, upon recovery, should be discharged from insane asylums, some record proof, which should operate to establish the fact of their recovery in the same way that the judgment of restoration, under section 1766 of the Code of Civil Procedure of that state, operated in the case of persons who had been declared incompetent and for whom guardians had been appointed.—*Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900, 903.

(3) **Power to discharge. Habeas corpus.**—After a person has been committed to an insane asylum in California under a charge of insanity, and received therein, no court in the state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person under any circumstances, except upon a writ of habeas corpus. The power to discharge him otherwise than by a writ of habeas corpus is vested exclusively in officers of the asylum.—*Kellogg v. Cochran*, 87 Cal. 192, 197, 12 L. R. A. 104, 25 Pac. 677; *Aldrich v. Superior Court*, 120 Cal. 140, 142, 52 Pac. 148. An alleged insane person is entitled to notice of an application to deprive him of his personal liberty. He is entitled to due process of law, and this includes, in all

cases, the right of the person to such notice of the claim as is appropriate to the proceedings and adapted to the nature of the case, and the right to be heard before any order or judgment in the proceeding can be made by which he will be deprived of his life, liberty, or property. To say that, if he is in fact insane, any notice to him will be vain, is to beg the very question the determination of which underlies the right of the state to deprive him of his liberty. The fact of his insanity is to be determined before his right to his liberty can be violated. If that question is determined against him, without any notice or opportunity to be heard, or to introduce evidence in his behalf, and, under such determination, he is confined in the asylum, his constitutional guaranty is violated.—*Matter of Lambert*, 134 Cal. 626, 633, 86 Am. St. Rep. 296, 55 L. R. A. 856, 66 Pac. 851. In the case last cited it was held that the insanity law of 1897, to the extent that it authorizes the confinement of a person in an insane asylum without giving him notice and an opportunity to be heard upon the charge against him, is unconstitutional, and that the proceedings by virtue of which the petitioner was held by the respondent were invalid. It was therefore ordered that the petitioner be released from the asylum. So the commitment of a person to a state hospital for the insane does not authorize his confinement if he is permanently restored to sanity. The act of 1897 and the act of 1903 both recognize this, and provide that any patient who has become sane may be discharged from further custody after examination on habeas corpus proceedings. And where the petition for the writ alleges that the petitioner is not insane, he is, upon that allegation, entitled to a preliminary writ, in order to inquire into its truth and discharge him if he is found to be sane; and the court, having power, will issue the writ, and make it returnable before any superior judge for determination by him.—*Ex parte Clary*, 149 Cal. 732, 87 Pac. 580, 582. The effect of an unconditional discharge of a patient from an insane asylum, by the authorities thereof, is to entitle him to his freedom until he has been recommitted by another judicial inquiry. A statute which authorizes the authorities of the asylum to discharge an inmate, if that be deemed proper in their judgment, does not vest them with authority to commit a person thereto without a judicial inquiry pursuant to that required by the statute.—*Byers v. Solier*, 16 Wyo. 232, 14 L. R. A. (N. S.) 468, 93 Pac. 59, 65. Under a statute which provides that the resident physician shall be the executive officer of a state asylum for the insane, and shall discharge such patients as, "in his opinion, have permanently recovered their reason," where a person has escaped from the asylum, but, shortly after, the physician causes his discharge to be recorded as recovered, it is a valid exercise of his authority, where he had intended, prior to such escape, to discharge the patient in a few days, believing him to have been then restored to reason. Under such circumstances there is a *prima facie* showing that the defendant has been restored to reason.—*People v. Gelger*, 116

Cal. 440, 48 Pac. 389. Even the discharge of a person from an insane asylum, though the certificate of the resident physician and secretary does not state that such person is cured and restored to reason, is prima facie evidence that the person is so restored, or that he was improperly committed.—*Clements v. McGinn*, 4 Cal. Unrep. 163, 33 Pac. 920, 923. If a petition for restoring an incompetent to legal capacity has been denied in one department of the district court, the statute, in effect, forbids a renewal of the petition in another department of the same district court; and, since a forbidden thing can not be accomplished by indirection, the denial can not be overcome by the granting, in the other department, of a writ of habeas corpus.—*State (ex rel. Carroll) v. District Court*, 50 Mont. 428, 147 Pac. 612. A person, confined in an insane asylum, who would be discharged therefrom must, in the interest of orderly procedure, apply to the superintendent for discharge, and on a writ of habeas corpus he must show that he made this application and it was refused, and that the relator has largely recovered his sanity.—*State (ex rel. Thompson) v. Clifford (Wash.)*, 179 Pac. 90. The answer of the superintendent of an insane asylum to a writ of habeas corpus, issued on the petition of an inmate, is sufficient if it alleges that the relator has made no application for release to him.—*State (ex rel. Thompson) v. Clifford (Wash.)*, 179 Pac. 90. A person committed to an asylum for the insane may, subsequently petition the superior court, in and for the county in which the asylum is, for a writ of habeas corpus; and the court has jurisdiction to try the question whether he has regained his sanity.—*State (ex rel. Thompson) v. Clifford (Wash.)*, 179 Pac. 90. Inasmuch as, under the Colorado statute relating to "insane persons, mental incompetents, and feeble-minded persons and their estates," matters in regard to the commitment of such persons are, like the appointment of guardians of minors, within the control of the county court, the supreme court will not assume original jurisdiction of an application for a writ of habeas corpus by a woman who has been committed, as an insane person, to the care and custody of her husband.—*Ex parte Rainboldt (Colo.)*, 172 Pac. 1068.

(4) **Power to discharge. "Patient."**—The jurisdiction of the superintendent of an insane asylum to discharge a person as recovered from insanity exists, under section 2189 of the Political Code of California, only where such person is a patient in the asylum. The only authority given to the superintendent by the statute is to discharge a "patient," and that by such "patient" is meant one who has been committed to the asylum and has remained there (except in case of a temporary absence, as on parole) for care and treatment. This is clear from a reading of the entire chapter of the Political Code dealing with the commitment and care of insane persons. One who has, for many years, been away from the asylum, claiming, without objection, to have been discharged by virtue of an order purporting

to have that effect, and over whom the asylum authorities do not exercise, or claim the right to exercise, any power of restraint whatever, can not be said to be a "patient," within the meaning of the law.—*Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900, 904. One who has been committed to the state asylum for the dangerous insane, can only be liberated in the way provided by law, that is, by a finding and order of the proper state authorities that he is wholly recovered and that no one will be in danger by reason of his discharge.—*In re Ostatter*, 103 Kan. 487, 175 Pac. 377. The superintendent of the state hospital for the insane has an official discretion to discharge a patient, when it may be expedient; and, if the patient, when discharged, does an injury to a third person the superintendent is not answerable in damages.—*Emery v. Littlejohn*, 83 Wash. 334, Ann. Cas. 1915D, 767, 145 Pac. 423. If an insane person is out on parole issued by the committing court, a court of general jurisdiction, such as the superior court, has power to discharge him without such person claiming his exemption from restraint by first applying to the superintendent of the hospital for the insane.—*State (ex rel. Martin) v. Superior Court*, 101 Wash. 81, 95, 4 A. L. R. 572, 172 Pac. 257.

(5) *Power to discharge. Effect of discharge.*—In the absence of a statute making contrary regulations or restrictions, or expressly or impliedly vesting exclusive authority in the premises elsewhere, the controlling authorities of an asylum, to carry out the obvious purpose of its establishment, must be held to possess the power to voluntarily release a committed party upon his recovery; or, in the exercise of a reasonable discretion, and acting in good faith, whenever the circumstances are deemed proper to justify such a course, to release a patient, who may not have fully recovered, either conditionally or temporarily, and upon expressed conditions; but where a patient has been unconditionally discharged by a competent authority of such institution, he can not be reincarcerated without another judicial inquiry.—*Byers v. Solter*, 16 Wyo. 232, 14 L. R. A. (N. S.) 468, 93 Pac. 59, 64. The effect of a discharge, by the officers of an asylum, of an insane inmate, if no guardian has been appointed for him, is to restore the person discharged to the legal capacity to sue.—*Kellogg v. Cochran*, 87 Cal. 192, 12 L. R. A. 104, 25 Pac. 677. The date of the medical superintendent's certificate final of discharge of an insane person from the custody and control of the state as recovered, and not the date of the decree of the superior court judicially determining such restoration in the absence of an averment that he had, in the meantime, been under guardianship under sections 1763 and 1764, Code of Civil Procedure of California; and such restored insane person is barred by laches if he seeks restoration to official status as a police officer seven years and eight months after such discharge.—*Knorp v. Board of Police Commissioners*, 31 Cal. App. 539, 540, 161 Pac. 12. After discharge from the asylum, of one adjudged insane and committed thereto, the pre-



sumption of insanity continues until it shall have been adjudged that a restoration to his right mind has taken place.—*Johnson v. Gustafson*, 96 Kan. 630, 152 Pac. 621.

(6) **Conclusiveness of discharge.**—The reasonable interpretation of section 2189 of the Political Code of California is, that it purports to make a certificate of discharge conclusive as against collateral attack, if issued by one having authority, in the particular case, to make it, but that such certificate always remains open to attack for want of such authority. The purpose of the section was to give to a certificate of discharge the effect of a judgment, as an adjudication of a fact, not to confer upon it any evidentiary value as conclusive proof of jurisdiction to make such adjudication.—*Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900, 903.

#### REFERENCES.

See separate note to § 177, ante, concerning the guardianship of insane persons and other incompetents.

## PART III.

### JURISDICTION OF COURTS.

#### CHAPTER I.

##### JURISDICTION OF COURTS.

- § 215. Over the estate, when exercised.
- § 216. First application. Exclusive jurisdiction.
- § 216.1 When jurisdiction of action is required.
- § 216.2 Appellate jurisdiction of district courts of appeal.
- § 216.3 Appellate jurisdiction of supreme court.

##### JURISDICTION OF COURTS.

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- 4. Jurisdictional facts.
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- 7. Exercise of jurisdiction. Effect of assuming, and refusing to exercise. Prohibition.
- 8. Original and concurrent jurisdiction.
- 9. Of particular courts and judges.
  - (1) Alaska. District courts and judges.
  - (2) Same. Probate courts and United States commissioner.
  - (3) Arizona. District courts.
  - (4) Same. Superior courts.
  - (5) California. Superior courts.
  - (6) Same. Want of jurisdiction.
  - (7) Colorado. County courts.
  - (8) Same. Want of jurisdiction.
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  - (13) Kansas. Probate courts.
  - (14) Same. District courts.
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  - (16) North Dakota. County courts.
  - (17) Same. District courts.
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  - (2) In county in which estate has not been "devised."
  - (3) Over proceeds of life-insurance policy.
  - (4) To foreclose mortgage.
  - (5) To order property to escheat when.

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| (6) Over timber-culture claimant's claim.                            | 15. Collateral attack.   |
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| (9) Of body of deceased.   | (2) Exists when.   |
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| (12) To try title.   | (5) Concurrent jurisdiction.   |
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| (15) Contempt.   | 18. Vacating orders and judgments in general.                              |
|  | 19. Same. Jurisdiction in equity.  |

### § 215. Over the estate, when exercised.

Wills must be proved, and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died;
2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state;
3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death;
4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died;
5. In all other cases, in the county where application for letters is first made.—*Kerr's Cyc. Code Civ. Proc.*, § 1294.

### ANALOGOUS AND IDENTICAL STATUTES,

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1604.

Arizona\*—Revised Statutes of 1913, paragraph 734.

Colorado—Mills's Statutes of 1912, sections 7900, 8043, 8050, and amendment, Laws of 1915, chapter 173, page 495.

Hawaii—Revised Laws of 1915, sections 2272, 2273, 2483.

Idaho\*—Compiled Statutes of 1919, section 7438.

Kansas—General Statutes of 1915, section 4485.

Montana—Revised Codes of 1907, section 7383.

Nevada—Revised Laws of 1912, section 5857.  
 New Mexico—Statutes of 1915, sections 1430, 2217, 2220.  
 North Dakota—Compiled Laws of 1913, section 8526.  
 Oklahoma\*—Revised Laws of 1910, section 6193.  
 Oregon—Lord's Oregon Laws, section 1141.  
 South Dakota\*—Compiled Laws of 1913, section 5656.  
 Utah—Compiled Laws of 1907, section 3774.  
 Washington—Laws of 1917, chapter 156, page 644, sections 6, 219.  
 Wyoming—Compiled Statutes of 1910, section 5407.

**§ 216. First application. Exclusive jurisdiction.**

When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such non-resident, and dying within the state, and not leaving estate in the county where he died, the superior court of that county in which application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.—*Kerr's Cyc. Code Civ. Proc.*, § 1295.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 735.  
 Colorado—Mills's Statutes of 1912, sections 7900, 8043, 8050, and amendment, Laws of 1915, chapter 173, page 495.  
 Idaho\*—Compiled Statutes of 1919, section 7439.  
 Kansas—General Statutes of 1915, section 4485.  
 Montana\*—Revised Codes of 1907, section 7384.  
 Nevada—Revised Laws of 1912, section 5857.  
 North Dakota—Compiled Laws of 1913, section 8526.  
 Oklahoma\*—Revised Laws of 1910, section 6194.  
 South Dakota\*—Compiled Laws of 1913, section 5657.  
 Utah—Compiled Laws of 1907, section 3775.  
 Washington—Laws of 1917, chapter 156, page 644, sections 7, 219.  
 Wyoming\*—Compiled Statutes of 1910, section 5408.

**§ 216.<sup>1</sup> When jurisdiction of action is acquired.**

From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the

parties, and to have control of all the subsequent proceedings. . . . The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him.—*Kerr's Cyc. Code Civ. Proc.*, § 416.

**§ 216.<sup>2</sup> Appellate jurisdiction of district courts of appeal.**

The district courts of appeal shall have appellate jurisdiction:

In all cases at law upon appeal from the superior courts in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars and does not amount to two thousand dollars.

In all cases, matters, and proceedings pending before the supreme court which shall be ordered by the supreme court to be transferred to a district court of appeal for hearing and decision.—*Kerr's Cyc. Code Civ. Proc.*, § 52a.

**§ 216.<sup>3</sup> Appellate jurisdiction of supreme court.**

The supreme court shall have appellate jurisdiction:

In all such probate matters as may be provided by law.

In all cases, matters and proceedings pending before a district court of appeal which shall be ordered by the supreme court to be transferred to itself for hearing and decision.—*Kerr's Cyc. Code Civ. Proc.*, § 52.

**JURISDICTION OF COURTS.**

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|---|-----------------------------------|
| 1. In general.  | (3) Arizona. District courts.     |
| 2. Is statutory and limited.  | (4) Same. Superior courts.        |
| 3. Probate courts as courts of record.  | (5) California. Superior courts.  |
| 4. Jurisdictional facts.  | (6) Same. Want of jurisdiction.   |
| 5. Construction of statute.   | (7) Colorado. County courts.      |
| 6. Invoking, effect of, and loss of.  | (8) Same. Want of jurisdiction.   |
| 7. Exercise of jurisdiction. Effect of assuming, and refusing to exercise. Prohibition. | (9) Same. District courts.        |
| 8. Original and concurrent jurisdiction.  | (10) Hawaii. Circuit judges.      |
| 9. Of particular courts and judges.   | (11) Idaho. Probate courts.       |
| (1) Alaska. District courts and judges.   | (12) Same. District courts.       |
| (2) Same. Probate courts and United States commissioner.                                | (13) Kansas. Probate courts.      |
|   | (14) Same. District courts.       |
|   | (15) Montana. District courts.    |
|   | (16) North Dakota. County courts. |
|   | (17) Same. District courts.       |

- (18) Oklahoma. County courts.
- (19) Same. District courts.
- (20) Same. Superior courts.
- (21) Same. Probate courts in general.
- (22) Oregon. County courts.
- (23) Same. Circuit courts.
- (24) South Dakota. County courts.
- (25) Same. Circuit courts.
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- 12. In particular matters.
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  - (2) In county in which estate has not been "devised."
  - (3) Over proceeds of life-insurance policy.
  - (4) To foreclose mortgage.
  - (5) To order property to escheat when.
- (6) Over timber-culture claimant's claim.
- (7) To appropriate share of heir or devisee to payment of his debts.
- (8) Where deceased was a non-resident.
- (9) Of body of deceased.
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- (11) To adjust disputed rights generally.
- (12) To try title.
- (13) To enforce a trust.
- (14) In what matters of guardianship.
- (15) Contempt.
- 15. Collateral attack.
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  - (1) In general.
  - (2) Exists when.
  - (3) Does not exist when.
  - (4) Where same court has jurisdiction in equity and in matters of probate.
  - (5) Concurrent jurisdiction.
  - (6) Of federal courts.
- 17. Attack on jurisdiction.
- 18. Vacating orders and judgments in general.
- 19. Same. Jurisdiction in equity.

1. In general.—Under our system, the same court has jurisdiction of cases at law, in equity, and in matters of probate, but the several classes of cases must be kept separate, and a petition to the court of probate ought not to be confounded with an action at law or a suit in chancery.—*Lucich v. Medin*, 3 Nev. 93, 99, 93 Am. Dec. 376. Proceedings for the settlement of an estate, and matters connected therewith, are not civil actions.—*Estate of Scott*, 15 Cal. 220, 222. If the probate court has no jurisdiction of the subject-matter before it, it follows that the higher courts can get no jurisdiction on appeal.—*Stewart v. Lohr*, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457. The superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity.—*Estate of Glenn*, 153 Cal. 77, 94 Pac. 230, 232. It is the universal rule, that a judgment rendered without jurisdiction of the person or of the subject-matter is void, and therefore can be attacked directly or collaterally, and set aside. Jurisdiction of the person can be waived, but that of the subject-matter can not. Jurisdiction, in the later decisions, is held to be not only the power to hear and determine, but also the power to render the particular judgment entered in the particular case.—*Watkins Land Mortgage Co. v. Mullen*, 8 Kan. App. 705, 54 Pac. 921. It is within the power of a court to require an executor or administrator, who has been remiss

in his duties, to turn over to his successor all property of the estate which has come into his hands.—*State v. District Court*, 35 Mont. 364, 366, 90 Pac. 161; (Citing Code Civ. Proc., § 2544). Section 723, Alaska Code, conferring upon courts and judicial officers all the means necessary to carry their jurisdiction into effect applies only when and after jurisdiction has been regularly obtained, and where no other course of proceeding is specially pointed out in the code.—*Martin v. White* (Alaska), 146 Fed. 461, 76 C. C. A. 671, 674. The trial court had jurisdiction to entertain this suit by a trustee in bankruptcy to construe a will under which the bankrupt was claimed to be a devisee.—*Scott v. Gillespie*, 103 Kan. 745, 176 Pac. 132. In an action to quiet title to lands brought against the unknown heirs of one erroneously supposed to be dead and the unknown heirs of those from whom his right and title to said lands descended and service is attempted to be made under the provisions of section 4729, Rev. Laws of Oklahoma, 1910, such one is not a party to said action and the court trying said action acquired no jurisdiction of him by such attempted service.—*Buck v. Simpson* (Okla.), 166 Pac. 146, 147. A testator can not, in his will, confer jurisdiction upon a judge in his judicial capacity to the exclusion of jurisdiction conferred by law; hence, where jurisdiction is subsequently taken from such judge and is transferred to another judge, the power to act ipso facto passes to such other judge.—*Estate of Carter*, 24 Haw. 536, 539. The writ of prohibition runs only against excess of jurisdiction on the part of the tribunal, the proceedings of which are sought to be arrested thereby.—*Estate of Turner*, 178 Cal. 95, 172, Pac. 759. Compliance with the statute relating to the publication of the citation to heirs, issued on the filing of an application for leave to sell real estate to pay debts, is as effective as a manual service of process, and the court has jurisdiction from the day of the final publication.—*Stadelman v. Miner*, 83 Or. 348, 155 Pac. 708, 163 Pac. 585, 163 Pac. 983. The courts have no authority, either by statute or otherwise, to compel the production of a will or enforce its cancellation, in a suit for that purpose, instituted during the lifetime of the maker.—*Pond v. Faust*, 90 Wash. 117, Ann. Cas. 1918A, 736, 155 Pac. 776. Juvenile courts are agencies of the state for directing the control and training of neglected children, to the end that they may be saved from evil lives and may grow up into good citizens.—*Ex parte Bowers*, *Bowers v. Grant*, 78 Or. 390, 153 Pac. 412.

#### REFERENCES.

Probate court jurisdiction.—See note 3 L. R. A. 812-815. Jurisdiction of surrogate's court.—See notes 2 L. R. A. 175-177, 828. Power of surrogate's court to vacate or set aside decree or order.—See note 2 L. R. A. 644.

2. Is statutory and limited.—The probate court is a court of special and limited jurisdiction.—*Clarke v. Perry*, 5 Cal. 58, 63 Am. Dec. 82; *Ethell v. Anchols*, 1 Ida. 741. Its jurisdiction can not be inferred; it

must be given by positive law.—*Cast v. Cast*, 1 Utah, 112. Proceedings for the administration of the estates of deceased persons, and for their distribution to those who may be entitled thereto, including the determination of the heirs of the decedent, are purely statutory.—*Smith v. Westerfield*, 88 Cal. 374, 378, 26 Pac. 206. The whole subject-matter of dealing with the estates of deceased persons is one of statutory regulation.—*Estate of Strong*, 119 Cal. 663, 665, 51 Pac. 1078. In New Mexico the jurisdiction of the probate court is confined to personal estates.—*Chaves v. Perea*, 3 N. M. 71, 2 Pac. 73, 75. By statute, original jurisdiction in bastardy proceedings was conferred upon the probate courts of Oklahoma, and said power was ratified by Congress.—*In re Comstock*, 10 Okla. 299, 61 Pac. 921. The jurisdiction exercised by courts of probate was never exercised by common law courts; it is purely statutory.—*Stratton v. Rice* (Colo.), 181 Pac. 529, 531. Jurisdiction in probate matters is entirely statutory and there is no inherent right to a jury trial.—*Stevens v. Myers*, 62 Or. 399, 126 Pac. 30.

3. Probate courts as courts of record.—In Oregon, the county court is to be regarded, in probate proceedings, as one of superior jurisdiction, because it is a court of record, and derives its power from the constitution.—*Monastes v. Catlin*, 6 Or. 119, 122; *Tustin v. Gaunt*, 4 Or. 305, 310; *Russell v. Lewis*, 3 Or. 380, 382; *Gager v. Henry*, 5 Saw. 237, Fed. Cas. No. 5,172; *Holmes v. Oregon & C. R. R. Co.*, 6 Saw. 262, 5 Fed. 75. The probate powers of the county courts of Oregon are enlarged, limited or varied by the statute, but not created by it.—*Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456. In that state, the county courts, in acting as courts of probate, are courts of general jurisdiction.—*Gager v. Henry*, 5 Saw. 237, Fed. Cas. No. 5,172; *Holmes v. Oregon & C. R. R. Co.*, 7 Saw. 380, 99 Fed. 229, 6 Saw. 262, 5 Fed. 75. After the jurisdiction of the probate court is once established, every intendment is in its favor, the same as in cases in courts of general jurisdiction.—*Glendenning v. McNutt*, 1 Ida. 592, 594; *Lucas v. Todd*, 28 Cal. 182, 185; *Irwin v. Scriber*, 18 Cal. 499. The same presumption attaches as to the proceedings of courts of general jurisdiction.—*Brodribb v. Tibbits*, 63 Cal. 80; *Irwin v. Scriber*, 18 Cal. 499, 505. When the record recites the method adopted to acquire jurisdiction of the persons interested in the estate, it will not be presumed that something different was done.—*Pearson v. Pearson*, 46 Cal. 609, 636. If the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done.—*Hahn v. Kelly*, 34 Cal. 391, 407, 94 Am. Dec. 742. Under the Idaho constitution, probate courts are made courts of record.—*Clark v. Rossier*, 10 Ida. 348, 2 Ann. Cas. 231, 78 Pac. 358; but they are courts of record only in matters of probate, settlement of estates of deceased persons, and the appointment of guardians. They are not courts of record in proceedings in civil and criminal actions.—*Dewey v. Schreiber Imp. Co.*, 12 Ida. 280, 85 Pac. 921. In other words, they have general jurisdiction of the "particular department of law allotted to them."—*Dewey v. Schreiber Imp. Co.*, 12 Ida. 280, 85 Pac. 921, 922.



The probate courts in Kansas are courts of record, and, while they have jurisdiction of particular classes of things only, such as the care of the estates of deceased persons, minors, and persons of unsound mind, yet they have general jurisdiction of these things. Hence, all presumptions should be in favor of the regularity of all the proceedings in a probate court, within its jurisdiction, and such proceedings should seldom be held to be void when attacked collaterally; never, indeed, except where it is shown affirmatively that the court had no jurisdiction.—*Higgins v. Reed*, 48 Kan. 272, 29 Pac. 389.

Courts of record and courts not of record differ only in that the record of the one speaks verity until reversed or set aside on appeal, while that of the other is subject to inquiry in a collateral proceeding; also, in that the former court has inherent power to correct its own records while the latter has such power of correction only as is given by statute.—*State (ex rel. Brockway) v. Whitehead*, 88 Wash. 549, 153 Pac. 349.

4. **Jurisdictional facts.**—There are two jurisdictional facts that must exist to support administration in every case: 1. The death of the party; 2. His residence within the county at the time of his death. These two facts must be alleged in the petition for letters, and they must be true in point of fact.—*Haynes v. Meeks*, 10 Cal. 110, 118, 70 Am. Dec. 703; *Abel v. Love*, 17 Cal. 234, 239; *Estate of Harlan*, 24 Cal. 182, 189, 85 Am. Dec. 58. The residence of the party at the time of his death, and not the situation of the estate, is the test of jurisdiction.—*Estate of Harlan*, 24 Cal. 182, 189, 85 Am. Dec. 58. While the residence of the decedent at the time of his death is the jurisdictional fact upon which the issuance of letters of administration must be based.—*Holmes v. Oregon & C. R. R. Co.*, 7 Saw. 380, 9 Fed. 229, 6 Saw. 262, 5 Fed. 75, yet the jurisdiction of the court may be disproved by showing the true place of residence of the deceased at the time of his death. A party is not estopped or concluded by the decision of the court proceeding without jurisdiction of the subject-matter, but may prove the want of jurisdiction in the court, in order to show that he is not concluded by its decision.—*Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369. Residence is one of those jurisdictional facts which the court must determine from the evidence produced before it, and its determination is valid until set aside in some proper manner.—*Estate of Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381. The probate court of a county has no jurisdiction over the estate of a deceased resident of the state to appoint an executor or administrator, or to prove a will, unless the deceased was at the time of his death an inhabitant or resident of the county of such probate court.—*Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369; *Estate of Latour*, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441. The supreme court will not, on appeal, review the conclusions of a trial court as to facts essential to its jurisdiction, concerning which such court was vested with the power to hear and determine, at the instance of a party who

has appeared in that court in an action or proceeding, and has omitted to urge in such court, in any way, his objection, but has proceeded therein upon the theory that the court had jurisdiction.—*Estate of Latour*, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441. Service of citation and notice of application for an order of sale by an administrator is jurisdictional and unless proved by the proper returns on file in the county court that court had no jurisdiction to order the sale.—*Browne v. Coleman*, 62 Or. 454, 125 Pac. 280. A court of original and general jurisdiction is one that has power to decide upon its own jurisdiction, and to exercise it to a final judgment, without setting forth in its proceedings the jurisdictional facts and evidence upon which it is rendered; its records import absolute verity, and the presumption of regularity attaches thereto; but a court of limited jurisdiction must set forth in its orders and judgments the facts and evidence necessary to establish their authority.—*Sylvester's Admr. v. Willson's Admr.*, 2 Alaska 325, 332. The jurisdiction of the probate court to hear and determine must first be established by showing the steps that gave to the court the authority over the matter under consideration; after the jurisdiction is established the judgment, orders, and decrees can be attacked collaterally for fraud only.—*In re Decker's Estate*, 3 Alaska 106, 109.

5. *Construction of statute.*—The laws of California not only recognize, but sedulously preserve, the distinction between foreign and domestic wills and the probate thereof. All domestic wills must be proved in the county of which the decedent was a resident at the time of his death. The state thus preserves its sovereignty and its jurisdiction over matters primarily belonging to it, and also preserves the rights of its other residents and citizens. All foreign wills may be proved and allowed as provided in the sections of the code relating thereto. In the case of a domestic will, all questions touching the validity of the instrument are, and should be, primarily and exclusively cognizable by the courts of the state of the domicile. When a foreign will is offered for probate in that state, two questions are open as new and original questions for the determination of its own probate courts: 1. The sufficiency of the proofs of foreign probate; and 2. The question of the residence of the deceased. And if, upon the question of residence, it shall be determined that the deceased was in truth a resident of that state, it follows, of necessity, that the proper state court has exclusive primary jurisdiction to admit the will to probate, and will not admit it as a foreign will for ancillary proceedings. It does not, of course, follow, that, because the probate court, under such circumstances, will not admit it as a foreign will, it will refuse it probate altogether. It will grant it probate, the facts warranting, in proceedings under the section relating thereto for original probate.—*Estate of Clark*, 148 Cal. 108, 114, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, 1 L. R. A. (N. S.) 996, 82 Pac. 760.

6. *Invoking, effect of, and loss of.*—While "the superior court is clothed with original jurisdiction over matters at probate," and provision is made that "a judge of the superior court, at any time, may make and issue all necessary orders or writs, and enforce the production of wills and the attendance of witnesses," yet it is not bound, of its own motion, to see that all necessary proceedings are taken, and witnesses called to probate every document filed, which is claimed to be a will. It is safe to assume that parties interested as devisees and legatees will always take the necessary steps and provide necessary funds to procure the attendance of witnesses to establish the validity of a will, if it is worthy of probate.—*Henry v. Superior Court*, 93 Cal. 569, 573, 29 Pac. 230. The old probate court did not lose its jurisdiction over a subject of which it had taken cognizance by sending an issue of fact from the probate to the old district court.—*Pond v. Pond*, 10 Cal. 495, 500. An insufficient showing made for the appointment of a special administrator is only an irregularity, and does not affect the court's jurisdiction.—*State v. Ayres*, 17 Wash. 127, 49 Pac. 226. The probate court ordinarily loses all jurisdiction over the property of the estate after the entry of the decree of distribution, except to compel delivery. Upon this principle, it has therefore been held that a writ of prohibition will lie to prevent partition, in probate proceedings, as between heirs and strangers, of interests held in common.—*Buckley v. Superior Court*, 102 Cal. 6, 10, 41 Am. St. Rep. 135, 36 Pac. 360. After a cause has been legally transferred from a superior to a district court, the jurisdiction of the superior court over the cause is lost, and an order of the latter court made at a succeeding term vacating and setting aside the order of transfer, and dismissing the case, is a mere nullity, and the order of dismissal does not constitute a bar to further proceedings in the district court.—*In re Nichol's Will (Okla.)*, 166 Pac. 1087, 1091. The court did not lose jurisdiction of an estate by an order discharging the administratrix, where such order was founded and conditioned upon a first decree of distribution, which was vacated on appeal; the matter then stood as though no decree had ever been made.—*In re Walker's Estate, Walker v. Nason (Cal.)*, 181 Pac. 792, 799. Where the probate of a will and the settlement of an estate are in controversy in the county court, and the widow, having been cited to appear and show cause why she should not be made a party to the proceeding, appears, the court has jurisdiction both of her person and of the subject-matter; and the widow can not, in any event, oust the county court of jurisdiction by beginning a suit in any district court.—*Stratton v. Rice (Colo.)*, 181 Pac. 529, 530.

7. *Exercise of jurisdiction. Effect of assuming, and refusing to exercise. Prohibition.*—After a probate court has acquired jurisdiction of the subject-matter, all subsequent proceedings are nothing but the exercise of jurisdiction over that subject-matter; and after it has once acquired jurisdiction of a person, any other movement affecting the person must be the exercise of jurisdiction as to that person; and when jurisdiction is

once acquired of both the subject-matter and the person, then any subsequent movement of the court must be the exercise of jurisdiction as to both.—*Haynes v. Meeks*, 10 Cal. 110, 118, 70 Am. Dec. 703. The county court of Colorado has power to hear and determine whether an instrument proposed is the last will and testament of the testator. In adjudicating this question, it has power to determine all pertinent facts. It has the power to determine whether or not the will is a forgery, and whether or not it was executed with the formalities essential to the validity of a will. This would include whether or not it was properly attested. An error committed in deciding upon any of these questions, would be an error, not in assuming jurisdiction, but in the exercise of jurisdiction.—*Camplin v. Jackson*, 34 Colo. 447, 83 Pac. 1017, 1018. After the court has assumed jurisdiction of an estate, in a proper case, it is without power to dispense summarily with its further administration because the heirs have consented that there shall be no administration of certain real property belonging to the decedent, who died without debts, or other estate, and refused to proceed further therein. It is the duty of the court, in such a case, to appoint an administrator and complete the administration.—*Estate of Strong*, 119 Cal. 663, 667, 51 Pac. 1078. Where letters of administration have been granted in one county to a public administrator, he has a sufficient beneficial interest in the estate to entitle him to a writ of prohibition to prevent further proceedings in the same estate, under a subsequent application in another county.—*Dungan v. Superior Court*, 149 Cal. 98, 104, 117 Am. St. Rep. 119, 84 Pac. 767.

8. Original and concurrent jurisdiction.—Under the provisions of the constitution of Idaho, probate courts are given original jurisdiction in all matters of probate, settlement of estates of deceased persons, and the appointment of guardians, and also jurisdiction to hear and determine all civil cases wherein the debt or damage claimed does not exceed the sum of five hundred dollars, exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal actions.—*Dewey v. Schreiber Imp. Co.*, 12 Ida. 280, 85 Pac. 921; *Clark v. Rossler*, 10 Ida. 348, 3 Ann. Cas. 231, 78 Pac. 358. In California there is no concurrent jurisdiction as to probate matters.—*Rosenberg v. Frank*, 58 Cal. 387, 419. The courts of a state may, and do, grant original probate upon wills of non-residents, who leave property within that state, but this exercise of original jurisdiction over the estate of non-residents affects only the property within the state. The judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration.—*Estate of Clark*, 148 Cal. 108, 112, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, 1 L. R. A. (N. S.) 996, 82 Pac. 760.

## 9. Of particular courts and judges.

(1) **Alaska. District courts and judges.**—The Alaskan Code of Civil Procedure, section 763, provides that the commissioners appointed in pursuance of that act and other laws of the United States have jurisdiction within their respective precincts, subject to the supervision of the district judge, in all testamentary and probate matters. Held under this section that such supervision by the district judges is appellate only and that the district court has no original jurisdiction in probate matters.—*Decker v. Decker*, 3 Alaska 121.

(2) **Same. Probate courts and United States commissioner.**—In respect to a descent of real property to the heir, the only jurisdiction of the probate court is to enforce the lien of the ancestor's debts against such property.—*Binswanger v. Henninger*, 1 Alaska 509, 511. The probate court of the district of Alaska is an inferior court and possesses only limited jurisdiction; hence, its orders, judgments, and decrees carry with them no presumptions of regularity, and a party relying on the same must establish not only the making of them, but also all the steps leading up to their making and the validity of such judgments and decrees.—*Sylvester's Admr. v. Willson's Admrs.*, 2 Alaska 325, 337. The jurisdiction of the United States Commissioner as ex-officio probate judge to appoint guardians for insane and incompetent persons is derived from the statute, and in order to obtain such jurisdiction it must affirmatively appear that the essential provisions of the statute were complied with.—*Martin v. White (Alaska)*, 146 Fed. 461, 76 C. C. A. 671, 674.

(3) **Arizona. District courts.**—In Arizona the jurisdiction of the district courts is purely appellate. They have no power to appoint administrators of the estates of deceased persons.—*Territory v. Mix*, 1 Ariz. 52, 25 Pac. 528; *Territory v. Forrest*, 1 Ariz. 49, 25 Pac. 527. Article 6, section 6 of the constitution of Arizona, which confers upon the superior court original jurisdiction in all matters of probate, did not affect the existing rules of procedure in probate matters, but the superior court in so far as it exercises jurisdiction in matters of estates of deceased persons is a court in probate.—*Garver v. Thoman*, 15 Ariz. 38, 135 Pac. 724, 726.

(4) **Same. Superior courts.**—The present superior courts, while exercising probate jurisdiction, have no authority to entertain a petition from a stranger for turning over to the petitioner assets of the estate, and to make an order as prayed.—*In re Tamer's Estate*, *Clayton v. Ella (Ariz.)*, 179 Pac. 644, 645.

(5) **California. Superior courts.**—The jurisdiction of the old probate courts did not divest the old district courts of California of their general jurisdiction as courts of chancery, over actions for a settlement of partnership affairs.—*Griggs v. Clark*, 23 Cal. 427, 429; and the district court had jurisdiction of an action to construe the will of a testator

after the same had been admitted to probate.—*Rosenberg v. Frank*, 58 Cal. 387, 404. The jurisdiction of the superior courts of the state of California in matters of probate is derived from the constitution. The court is not, therefore, while sitting in probate, a statutory tribunal, and does not derive its power from the act of the legislature. Nor are probate proceedings classed by the constitution as special proceedings. The administration of an estate is a proceeding in rem, which is not, in the technical sense, such a special proceeding, unknown to the framework of the common law, as will change the presumptions which attach to the action of the court, making it, *pro hac vice*, a court of inferior and limited jurisdiction.—*Burris v. Kennedy*, 108 Cal. 331, 336, 41 Pac. 458. The probate jurisdiction of the superior court of the state of California is separate and distinct from its jurisdiction in ordinary civil actions.—*Estate of Allgier*, 65 Cal. 228, 3 Pac. 849. Such court, while sitting as a court of probate, has only such powers as are given to it by the statute and such incidental powers as pertain to all courts for the purposes of enabling them to exercise the jurisdiction which is conferred upon them. Although it is a court of general jurisdiction, yet, in the exercise of these powers, its jurisdiction is limited and special, and whenever its acts are shown to have been in excess of the power conferred upon it, and without the limitation of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority or submitted to its decisions.—*Smith v. Westerfield*, 88 Cal. 374, 378, 26 Pac. 206. Probate proceedings being purely statutory, and therefore special in their nature, the superior court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provision of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided.—*Estate of Strong*, 119 Cal. 663, 666, 51 Pac. 1078. The superior court, while sitting in matters of probate, is the same as it is while sitting in cases of equity, in cases of law, or in special proceedings; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such cases. This is an incidental power pertaining to all courts, for the purpose of enabling them to exercise the jurisdiction which is conferred upon them.—*Estate of Burton*, 93 Cal. 459, 463, 29 Pac. 36. No distinct "court of probate" has been created or recognized by the present constitution of California. The constitution has created superior courts, and has given to them original jurisdiction of the subject-matter of various classes of actions and proceedings, more or less distinct from each other; among which are "all actions at law which involve the title or possession of real property," and "all such special cases and proceedings as are not otherwise provided for," and "all matters of probate."—*Estate of Burton*, 93 Cal. 459, 462, 29 Pac. 36. Under the present constitution of the state of California, the superior

courts of that state have jurisdiction both of matters in equity and of probate. They are the same superior courts for all purposes, where they have jurisdiction.—*Pennie v. Roach*, 94 Cal. 515, 521, 29 Pac. 956, 30 Pac. 106. But the superior court, sitting in probate, has jurisdiction to hear and determine a defense of fraud raised by a widow in her answer to a petition contesting her right to appointment as administratrix of the estate.—*Estate of Warner*, 6 Cal. App. 361, 92 Pac. 191, 194. The superior court, sitting as a court of equity, has power to hear and determine, in proper cases, questions relating to the rights and duties of executors and beneficiaries under wills which have been admitted to probate.—*Williams v. Williams*, 73 Cal. 99, 104, 14 Pac. 394. But the superior court, as a superior court, has no power to set aside land, sought to be recovered in an action of ejectment, as a homestead for the benefit of minor heirs of the intestate. That matter comes within the domain of the superior court sitting as a court of probate.—*Richards v. Wetmore*, 66 Cal. 365, 366, 5 Pac. 620. It may be said that, at the present time, in California, there is no probate court, in the sense in which that term has been used in the earlier volumes of the California reports. Under the fundamental law, it is a probate jurisdiction vested in the superior court. It may be said that the probate court is gone, but that the probate jurisdiction remains. And that jurisdiction is now vested in the same court that exercises jurisdiction in cases of law and equity. Yet the probate jurisdiction of the superior court is different from its law and equity jurisdiction in this: it is essentially a jurisdiction under the control of the state legislature. That law-making power may enlarge it or may restrict it. The character and extent of the jurisdiction is not only a matter under legislative control alone, but the procedure by which that jurisdiction may be invoked and rights thereunder adjudicated is expressly laid down by statute; and that procedure must be followed, or relief under that jurisdiction can not be secured. While the superior court in that state exercises both equity and probate powers, still, the procedure to be followed in seeking relief within those two jurisdictions is widely varied. And if the probate procedure laid down by the code is followed, then relief under probate jurisdiction only can be granted. In such a case, general equity relief can not be secured.—*Estate of Davis*, 136 Cal. 590, 597, 69 Pac. 412. It is true that the superior court sitting in probate is limited in its jurisdiction to the extent that it must follow the mode of procedure provided by statute in the administration of the estate of a decedent, and can only determine those questions or matters arising in the estate which it is authorized to do; but it is authorized to determine the question whether a creditor is or is not entitled to an order for the payment of his allowed claim, as that is a controversy arising in the estate itself and involves the right of the creditor to share in its assets; and the fact that the superior court, acting in probate, may be called upon to apply legal or equitable rules or principles in considering a question it is called upon to determine

does not affect its jurisdiction to do so.—*Estate of Bell*, 168 Cal. 253, 257, 141 Pac. 1179. The superior court sitting in probate is a court of general jurisdiction, and, in determining any question arising in the administration of an estate, which it is expressly authorized to decide, it may bring to its aid the full equitable and legal powers with which, as the superior court, it is invested.—*Estate of Bell*, 168 Cal. 253, 257, 141 Pac. 1179. The superior court, while sitting in matters of probate, is the same as it is while sitting in cases of equity, in cases at law, or in special proceedings, and, when it has jurisdiction of the subject-matter of a case falling within either one of these classes, it has power to hear and determine in the mode provided by law all questions of law and fact, the determination of which is ancillary to a proper judgment.—*Estate of Bell*, 168 Cal. 253, 257, 141 Pac. 1179. The jurisdiction of the probate court is a jurisdiction in rem, the res being the estate of the decedent which is to be administered and distributed with regard to the rights of creditors, devisees, legatees, and all the world.—*Warren v. Ellis* (Cal. App.), 179 Pac. 544, 546. In the state of California the same presumption exists in favor of the acts of the superior court done in the exercise of its probate jurisdiction, as exists in favor of its acts done in ordinary litigation between parties.—*Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263.

(6) Same. Want of jurisdiction.—The superior court sitting in probate can not go into an accounting of a copartnership, nor determine the ownership of shares of stock which as yet are no part of the estate, and in respect of which the administrator refuses to take steps necessary to determine their ownership. The equity court alone can and will afford relief where the powers of the probate court are inadequate to do justice.—*Raish v. Warren*, 18 Cal. App. 655, 124 Pac. 95. The superior court of California has no jurisdiction to vacate a claim allowed and settled, which has become final by the lapse of time, and prohibition will lie to prevent the vacating thereof on motion of the administrator of the estate.—*Kowalsky v. Superior Court*, 13 Cal. App. 218, 109 Pac. 158. The superior court sitting in probate has no jurisdiction to set apart property as a homestead where the same is alleged in the petition therefor to be the separate property of the petitioner.—*Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062. The superior court has no jurisdiction under section 1766, Code of Civil Procedure, to hear and determine the question of the mental capacity of a person previously adjudged as insane and confined in a state hospital and afterwards paroled or discharged, that jurisdiction in the absence of guardianship proceedings being vested exclusively in the officers of the state hospital.—*Knorp v. Board of Police Commissioners*, 31 Cal. App. 539, 541, 161 Pac. 12. It is not within the province of the probate court to say that a parent, if a fit person to control the custody and education of a child, is or is not educating it aptly for some calling for which the court deems it to be adapted.—*Estate of McSwain*, *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117.



(7) **Colorado. County courts.**—In Colorado, county courts, in matters of probate business, relating to the settlement of the estates of deceased persons, are invested with extensive and unlimited original jurisdiction, legal and equitable, and with large discretionary powers. The power to regulate and to control the settlement of such estates is expressly conferred upon them.—*Fleming v. Kelly*, 18 Colo. App. 23, 69 Pac. 272. The state constitution gives to the county court exclusive original jurisdiction in probate matters; hence, an act of the legislature, whereby on stipulation by the parties or action by the court on its own motion a probate question may be certified to the district court is invalid.—*In re Brown's Estate*, *Brown v. Niles* (Colo.), 176 Pac. 477, 479. County courts have original jurisdiction in probate matters, and are clothed with equitable powers in the settlement of estates, wherefore they may vacate and set aside the allowance of claims, charged to have been procured through fraud.—*McLaughlin v. Rote*, 62 Colo. 505, 163 Pac. 841.

(8) **Same. Want of jurisdiction.**—A county court of Colorado sitting in probate has no jurisdiction to determine the validity of an antenuptial settlement made between decedent and his widow.—*Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 68. The probate court has no jurisdiction in the state of Colorado to set aside its decree of distribution after the expiration of the term at which the decree was entered.—*Connolly v. Probate Court*, 25 Ida. 35, 136 Pac. 205. The jurisdiction of the county court in probate matters, depending upon the residence of the testator or intestate, is one that may be waived by the heirs of intestate, or the heirs and beneficiaries named in the will of testate estates.—*Miller v. Weston*, 25 Colo. App. 231, 138 Pac. 424, 428.

(9) **Same. District courts.**—The district court has original jurisdiction of the subject-matter of trusts and partnerships and to try all the issues alleged to be involved. By the appeal it acquired jurisdiction of the persons and by entering upon the trial without objection predicated upon the jurisdiction of the probate court to try the issues, that objection must be regarded as waived.—*Brown's Estate v. Stair*, 25 Colo. App. 140, 136 Pac. 1003, 1005. The question of the jurisdiction of the county court over any particular estate must first be raised in the county court and determined there, and if not so raised and determined and an appeal therefrom taken, it can not thereafter ordinarily be raised in the district court, or elsewhere than in the county court, unless the defect of jurisdiction appears upon the face of the pleadings filed in the county court, transmitted to the district court, affirmatively show a lack of jurisdiction. The question of residence is a question of fact, which can be determined only by evidence, and which, in the absence of a showing by the record, must be presumed to have been ascertained and determined by the county court in favor of such jurisdictional facts.—*Miller v. Weston*, 25 Colo. App. 231, 138 Pac. 424, 427.

(10) **Hawaii. Circuit judges.**—All original equity jurisdiction having been taken, by the Hawaiian Judiciary Act of 1892, from the several justices of the supreme court and reposed in the circuit judges of the islands, the power to appoint, upon the proper application, a third trustee under a will, is now exercisable by a circuit judge and not by a justice of the supreme court.—*Estate of Carter*, 24 Haw. 536, 540. The statute of Hawaii, giving to circuit judges at chambers jurisdiction "to determine the heirs at law of deceased persons and to decree the distribution of intestate estates" does not extend to cases where the decedent left a will, though there be a partial intestacy.—*Estate of Kaiona*, 24 Haw. 148, 150. A circuit judge sitting at chambers in a proceeding in probate has no authority to make an order directing a trustee to render an accounting or to pay money into court.—*De Mello*, *Estate of*, 23 Haw. 720, 723.\* Where a testator in his will attempts to confer jurisdiction upon a judge in his judicial capacity, where the judge as a matter of law has jurisdiction in the premises, the judge acts by virtue of the law and not under the authority of the will, and in case jurisdiction is subsequently taken from such judge and transferred to another judge the power to act ipso facto passes to such other judge.—*In re Estate of Carter*, 24 Haw. 536.

(11) **Idaho. Probate courts.**—The probate courts of Idaho have, in addition to their probate jurisdiction, power to hear and determine certain civil causes, but their probate jurisdiction is all that we are concerned with in this work.—See *Idaho Comp. Stat.* 1919, § 6466. Appellate jurisdiction of district court of Idaho in probate matters.—See §§ 7173-7178.

(12) **Same, District courts.**—Under the provisions of section 20, article 5 of the constitution of Idaho, the district court has original jurisdiction in all cases both in law and equity, but it does not have original jurisdiction in probate and guardianship matters, as the original jurisdiction in such matters is given to the probate court under the provisions of section 21 of said article 5 of the constitution.—*Idaho Trust Co. v. Miller*, 16 Idaho 308, 102 Pac. 360.

(13) **Kansas. Probate courts.**—A probate court is without jurisdiction to appoint an administrator of the estate of a deceased person unless the deceased was a resident of the county of the court at the time of his death, and the decision of a probate court that the deceased was a resident of the county of the court at the time of his death is open to collateral attack for the purpose of showing a lack of jurisdiction to make the appointment.—*Dresser v. Fourth Nat. Bank*, 101 Kan. 401, 168 Pac. 672. The probate court has authority to approve a voluntary partition of real estate which is just and equal, agreed upon by the guardian of an insane person and his ward's cotenants.—*Bennett v. Arrowsmith*, 101 Kan. 143, 165 Pac. 812. Under the power had by the probate court, to decide upon what disposition is to be made of a decedent's property, that court can not decide what property

the decedent owned; the court can not decide questions of title.—*Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757. When no rights of third persons are at stake, the probate court may set aside a widow's election, made by her under a misapprehension of her rights under the will; such misapprehension arising from her not having been sufficiently advised in that respect.—*In re Osborn's Estate*, 99 Kan. 227, 161 Pac. 601.

(14) *Same*. *District courts*.—In Kansas, where a fraudulent claim is presented to the probate court against the estate of a deceased person, and the administrator and claimant conspire together to secure its allowance, and land is sold to satisfy the demand, and bid in by the claimant, the sale approved, and the administrator discharged, the district court has jurisdiction of an action to set aside the proceedings and to annul the deed.—*McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529.

(15) *Montana*. *District courts*.—A district court of Montana, sitting as a court of probate, has only such powers as are expressly conferred upon it by statute, and such as are necessarily implied in order to carry out those expressly conferred, and in the exercise of its jurisdiction it is limited by the provisions of the statute.—*In re Tuohy's Estate*, 33 Mont. 230, 83 Pac. 486, 489. The jurisdiction of a district court in Montana when sitting in probate is statutory and its proceedings are regulated by statute and are in rem.—*State v. District Court*, 41 Mont. 369, 109 Pac. 441. A district court of Montana sitting in probate has only the special and limited powers conferred by statute; it has no power to hear and determine any matters other than those which come within the purview of the statute or which are implied as necessary to a complete exercise of those expressly conferred.—*In re Dolenty's Estate*, *Mannix v. Dolenty*, 53 Mont. 33, 101 Pac. 524. A district court of Montana sitting in probate has no power, in connection with the settlement of estates of decedents, to determine questions of title between the estate and persons claiming adversely to it; these questions must be determined in proper proceedings instituted for that purpose.—*In re Dolenty's Estate*, *Mannix v. Dolenty*, 53 Mont. 33, 161 Pac. 524.

(16) *North Dakota*. *County courts*.—The county court of North Dakota has jurisdiction in probate and testamentary matters, as limited by law, and its decree is of equal rank with a judgment entered in other courts of that state, and is entitled to the same faith and credit.—*Reichert v. Reichert* (N. D.), 170 N. W. 621. The county court has exclusive original jurisdiction in probate and testamentary matters, including the litigation of the validity of claims against estates and the entry of final judgment on the same as against the estate; no other court has this power except as an exercise of appellate jurisdiction.—*Johnson v. Rutherford*, 28 N. D. 87, 100, 147 N. W. 390. The county court has exclusive original jurisdiction of matters concerning either the person or estates, or both, of minors.—*Cass County v. Nixon*,

35 N. D. 601, 604, L. R. A. 1917C, 897, 161 N. W. 204. The county court, sitting as a probate court, has jurisdiction of the subject-matter, in a proceeding on application for a mother's pension.—*Cass County v. Nixon*, 35 N. D. 601, 604, L. R. A. 1917C, 897, 161 N. W. 204. The county court has power and authority to determine judicially the fact and the extent of an heir's indebtedness to the estate, and to order a deduction of the same from his share.—*Stenson v. H. S. Halvorson Co.*, 28 N. D. 151, 162, Ann. Cas. 1916D, 1289, L. R. A. 1915A, 1179, 147 N. W. 800. The power or authority of a county court to vacate or open up its final decree on a motion covering the grounds of fraud, deception, or misrepresentation expires at the end of one year from the entry of such decree.—*Reichert v. Reichert* (N. D.), 170 N. W. 621. County courts may, in the exercise of their probate jurisdiction, issue two kinds of orders; first, orders which are based upon a written application; second, orders which they may make at their own discretion on their own motion, without a written application.—*Tyvand v. McDonnell*, 37 N. D. 251, 164 N. W. 1. The county court has no equitable jurisdiction except such as inheres in its common-law, constitutional, and statutory powers.—*Reichert v. Reichert* (N. D.), 170 N. W. 621.

(17) *Same. District courts.*—While an estate is in the course of administration and before any final decree of distribution has been entered in the probate or county court, the district court has no jurisdiction of a suit by an heir for partition of the property; the statute which gives a right of action to the heirs does not confer any right to maintain an action that is hostile to the administrator.—*Honsinger v. Stewart*, 34 N. D. 513, 518, 159 N. W. 12.

(18) *Oklahoma. County courts.*—Section 13 of article 7 of the constitution provides that the county court shall have the general jurisdiction of a probate court, and shall transact all business appertaining to the estates of deceased persons.—*Belt v. Bush* (Okla.), 176 Pac. 935. A county court of Oklahoma has full control and jurisdiction of all probate matters, and may, at any time prior to a minor's attaining full age when the estate of such minor is invalid in any proceeding pending in said court, on proper notice and for sufficient grounds, modify or vacate any order or judgment made by it in the minor's interest.—*In re Johnson, Twin State Oil Co. v. Johnson* (Okla.), 179 Pac. 605. In the exercise of its exclusive jurisdiction, to transact all business appertaining to the estates of minors, the county court has all the powers relating to the conduct of minor's estates which formerly belonged to courts of equity; it has a right to exercise its jurisdiction to the very best advantage of the ward's estate.—*Mallen v. Ruth Oil Co.* (Okla.), 230 Fed. 497. Authority to approve a deed by an heir of a deceased Indian allottee of land vests solely in the county court of the county in which the allottee resided at the time of his or her death; that is the only court having jurisdiction over the settlement of the estate, and no other county court has the right to dis-

charge the federal statutory duty of approving such a deed.—Okla. Oil Co. v. Bartlett (Okla.), 236 Fed. 488, 493, 179 C. C. A. 540. The county court is always open and in session for the transaction of probate business, and statutory provisions for the holding of terms of the county court do not apply to probate matters.—Southern Surety Co. v. Chambers (Okla.), 180 Pac. 711. The county court has no jurisdiction to order a guardian to restore to a lessee of property of the ward a bonus paid by the lessee for having the lease made to him.—In re Johnson, Twin State Oil Co. v. Johnson (Okla.), 179 Pac. 605. As a matter of law, the county court still retains its jurisdiction, prior to the passing of title, upon proper notice and for good reasons shown, to set aside an order authorizing a sale of the land of a minor; and a probate sale of the lands of a minor, when the proceeds are intended for investment, is one friendly to the minor, and when it is made to appear to the court, prior to passing of title, that it is to the best interests of the minor that the lands should not be sold, it is the duty of the court, upon proper notice, to hear the matter, and if required by the best interests of the minor, to set aside the order authorizing the sale.—In re Hickory's Guardianship (Okla.), 182 Pac. 233, 237. A county court in the state of Oklahoma by reason of section 12 of article 7 of the constitution, has no jurisdiction in a probate proceeding by a guardian for an order of sale of the ward's real estate to hear and determine a claim of a third person to the real estate adverse to the ward.—Jefferson v. Winkler, 26 Okla. 653, 110 Pac. 755. The county court is without jurisdiction to decree a partition of lands inherited by full blood Indians of the Five Civilized Tribes from a deceased allottee who was also a full blood Indian of said tribes.—Lewis v. Gillard, Gardner v. Lewis (Okla.), 173 Pac. 1136.

(19) **Same. District courts.**—The power of the district court to hear and review the orders of the county court in probate matters is appellate and not original, and can be invoked only in the manner prescribed by statute.—Adair v. Montgomery (Okla.), 176 Pac. 911. The district courts of Oklahoma have jurisdiction of a partition suit of a tract of land allotted to a citizen of the Five Civilized Tribes, where such lands descended to the heirs free of restrictions.—Griffin v. Culp (Okla.), 174 Pac. 495. The district courts of Oklahoma are without jurisdiction to entertain an action for the partition of real estate inherited by full-blood Indians of the Five Civilized Tribes from a deceased allottee, who was also a full-blood Indian of one of said tribes.—Hoodenpyl v. Champion (Okla.), 177 Pac. 369. A deed executed by a Creek Indian minor, to allotted lands inherited by him, is null and void, if not made pursuant to an order of the county court having jurisdiction; and the district court is without jurisdiction to give validity to such a deed.—Crow v. Hardridge (Okla.), 175 Pac. 115. On April 27, 1915, the district courts of Oklahoma were without jurisdiction of a suit by the full-blood Indian heirs of a deceased Pawnee Indian, involving lands allotted to decedent by the United States, where such

suit necessarily included the determination of the title, and, incidentally, the right to the possession of the Indian allotment while the same was held in trust by the United States.—*Caesar v. Krow* (Okla.), 176 Pac. 927, 928. The district courts of the state of Oklahoma have jurisdiction in actions in ejectment. Prior to the admission of the state the will of a deceased Indian was duly probated and executed by the executor in the Indian Territory and all the debts of the estate paid. There was but one beneficiary under the will. Held that a district court of the state has jurisdiction of an action in ejectment to recover possession of or of a suit to remove claim from title to the allotted lands of deceased brought by the heirs at law of the deceased against the beneficiary under the will.—*Austin v. Chambers*, 33 Okla. 40, 124 Pac. 310.

(20) *Same. Superior courts.*—Section 1798, Rev. Laws, 1910, granting to the superior courts "concurrent jurisdiction with the district court in all proceedings, causes or matters" confers upon the superior courts jurisdiction of an appeal from the judgment of the county court in probate proceedings to contest the probate of a will, and such an appeal may be prosecuted directly to the superior court.—*In re Nichol's Will* (Okla.), 166 Pac. 1087, 1089.

(21) *Same. Probate courts in general.*—The probate courts of Oklahoma have jurisdiction over allotted lands inherited by a minor allottee of the Five Civilized Tribes.—*Crow v. Wardridge* (Okla.), 175 Pac. 115. The Oklahoma probate court is a court of general jurisdiction, with all intendment as to the regularity of its proceedings as obtains in the case of other courts of like jurisdiction, and such proceedings are not subject to collateral attack, unless void.—*Rice v. Theimer*, 45 Okla. 618, 626, 146 Pac. 702. The provision of section 6 of the act of congress of May 27, 1908, "that persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma," embraces allotted lands inherited by such minor.—*Crow v. Hardridge* (Okla.), 175 Pac. 115, 116. The allotment of a full-blood Creek Indian, who died in April, 1910, intestate, passed to his heirs free from the debts created by the allottee before his death, and the probate court did not acquire jurisdiction to sell the allotment to pay the debts and a deed executed by the administrator of the estate of the allottee, upon a sale made to pay the debts of the deceased allottee is void, and the grantee in said deed acquires no title as against the heirs of the allottee.—*Eastern Oil Co. v. Harjo*, 57 Okla. 676, 157 Pac. 921. Upon the death of an Indian allottee of the Seminole nation prior to the passage of the Act April 26, 1906 the homestead of such allottee passed to the heirs free of all restrictions without regard to the degree of Indian blood, or whether an adult or a minor, and prior to the passage of that act the probate courts had jurisdiction to authorize and confirm a separate sale by guardian of

such inherited interest of a minor in the homestead independent of a sale by the adult heirs, under the procedure applicable to minors generally.—*Lula, Seminole Roll No. 908 v. Powell (Okla.)*, 166 Pac. 1050, 1052. The probate court was authorized by the act of congress of May 27, 1908, to sell the inherited interest of the full-blood Indian minors in the allotments of deceased allottees in conformity with the usual procedure of such courts in matters of probate, and it is held that the approval by such court of a guardianship sale of such interest, with direction to the guardian to execute a deed to the purchaser is a substantial compliance with the provision of section 9 requiring such approval.—*Chupco v. Chapman (Okla.)*, 170 Pac. 259, 266.

(22) *Oregon. County courts.*—The powers of a county court of Oregon, as to probate jurisdiction, are not created by statute but originate in the constitution, and the legislature can not take away such powers from that court.—*State v. McDonald*, 55 Or. 419, 431, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444. Under the constitution and statutes of Oregon, a probate court has power, by its decree, to direct the manner of the distribution of the estate of a deceased person, and also the power upon a proper petition to construe a will as incidental to such direction if that is necessary; and county courts have been given the jurisdiction pertaining to probate courts.—*In re Wilson's Estate, Mackin v. Noad*, 85 Or. 604, 167 Pac. 580, 585. The jurisdiction of a county court over the personalty of an estate has its source in the constitution, and the legislature has no power to deprive the county court of its primary and fundamental jurisdiction to determine the heirship as to personalty and to make distribution of the estate of a decedent; a statute which attempts to do so is unconstitutional, as the act of 1903, respecting proceedings in escheat cases.—*State v. McDonald*, 55 Or. 419, 432, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444. The county court, in probate matters, is a court of general and superior jurisdiction; and, as to the probate of wills, its jurisdiction is exclusive.—*Hillman v. Young*, 64 Or. 73, 81, 127 Pac. 793, 129 Pac. 124; *Stevens v. Myers*, 62 Or. 372, 408, 121 Pac. 434, 126 Pac. 29. In construing the several sections of the constitution, bearing upon the judicial power, and the statutes passed in conformity with the constitution, it has been frequently held that in probate matters the county courts in Oregon are courts of general and superior jurisdiction.—*Yeaton v. Barnhart*, 78 Or. 249, 150 Pac. 742, 152 Pac. 1192. There can be no escape from the requirement of the statute, that the county court exercise its powers in probate matters by proceeding as in equity rather than at law, by making a distinction between the mere proof of a will, in common form, and a proceeding to set aside; in either case, the question is the same, namely, the proof of the will.—*Stevens v. Myers*, 62 Or. 372, 412, 121 Pac. 434, 126 Pac. 29. County courts have necessarily large discretionary power over the conduct of executors and administrators.—*In re Marks' Estate*, 81 Or. 632, 639, 160 Pac. 540, 542. A county court, though it is one of general and superior

jurisdiction in probate matters, is not vested with general equity powers; such authority can not be exercised, except by a court of chancery, though the subject-matter of the suit may have been indirectly involved in the probate court.—*Hillman v. Young*, 64 Or. 73, 81, 127 Pac. 793, 129 Pac. 124.

(23) *Same. Circuit courts.*—Prior to the amendment of the law of 1907, the circuit court of Multnomah county had original jurisdiction as a juvenile court, since the county contained over one hundred thousand inhabitants; the amendment gave the county courts of all the several counties original, concurrent jurisdiction in all cases coming within the terms of the juvenile court act, but that amendment did not deprive such circuit court of jurisdiction that had first attached in such a case, and a county court could not interfere with such jurisdiction.—*Ex parte Bowers*, *Bowers v. Grant*, 78 Or. 390, 153 Pac. 412. The circuit court of Oregon has jurisdiction to admeasure dower.—*Browne v. Coleman*, 62 Or. 454, 125 Pac. 281.

(24) *South Dakota. County Courts.*—County courts in South Dakota were, by the constitution, given original jurisdiction of all matters of probate, guardianship, and settlement of estates of deceased persons; but this jurisdiction, containing no further constitutional definition or limitation, is subject to legislative definition and limitation; and it seems, in the light of statutes which have been passed, that the county court no longer has any authority to appoint guardians for destitute and abandoned children; but that such jurisdiction is vested in the circuit courts of that state.—*Kronschnabel v. Isenhuth*, 34 S. D. 218, 148 N. W. 9. Under the constitution and statutes of the state of South Dakota an original or independent action or proceeding can not be brought in the county court to obtain a construction of the terms of a will, but there is given to such court the equitable power in the course of the administration of an estate, to construe a will so far as such construction may be necessary in order to administer such estate under said will and distribute same to the parties entitled thereto. The county court construes every will when it decrees a distribution thereunder, or when it orders the payment of a debt or legacy from any particular fund, and such court has jurisdiction to construe a will for the purpose of determining whether certain land was to be distributed to testatrix's children or to be set over to the petitioner at a certain price named in the will and the proceeds distributed among such children.—*In re Sjurson's Estate*, 29 S. D. 566, 572, 137 Pac. 341. A county court in South Dakota has jurisdiction to pass upon the question whether a party has elected to take under a will.—*In re Prerost's Estate*, *De Camp v. Prerost* (S. D.), 168 N. W. 631. In probate matters, the county court is a court of general jurisdiction, and, as such, has the same inherent powers over its orders and judgments as is vested in other courts of general jurisdiction.—*In re Stroup's Estate* (S. D.), 166 N. W. 155.



(25) *Same. Circuit courts.*—The constitution has given the circuit court equity powers in respect to estates of decedents, and those powers can not be taken away by a mere act of the legislature.—*Jacquish v. Deming* (S. D.), 167 N. W. 157. A legislative act, giving to the county court, in counties having a population of less than 10,000, "exclusive original jurisdiction in the matters of probate, and settlement of estates of deceased persons" does not operate to take such jurisdiction away from the circuit court which has it under the constitution.—*Jacquish v. Deming* (S. D.), 167 Pac. 157. On appeal from a judgment vacating an order of the county court, depriving a father of the custody of his children and restoring their care and custody to him, the case stands in the circuit court for trial *de novo*; that court has all the power which the county court might have, but it has no other or further authority than was vested in the county court.—*In re Skowron* (S. D.), 172 N. W. 806.

(26) *Utah. District courts.*—There is no such court in the state of Utah as the probate court, and the only courts in that state having original jurisdiction are the district courts.—*Weyant v. Utah Sav. & Trust Co.* (Utah), 182 Pac. 189, 198.

(27) *Washington. Superior courts.*—The constitution of the state of Washington does not make the superior courts probate courts. On the contrary, it vests the superior courts with jurisdiction "of all matters of probate." Hence the probate court is not shorn of its general powers, simply because the matter before it may be one which was cognizable formerly in a court of probate. It possesses in every case, and at all times, its powers as a court of superior and general jurisdiction, and among these is the power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. A statute, therefore, can neither add to nor can it take away the power, and it is immaterial to inquire whether or not one conferring such a power is in existence.—*Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502, 503. The constitution of Washington, in conferring jurisdiction upon the superior courts in probate matters, simply threw such matters into the aggregate jurisdiction of superior courts as courts of general jurisdiction, to be exercised along with their other jurisdictional powers, legal and equitable, and as a part of those general powers; and the inherent powers of such courts are not dependent upon the statutory enumeration of their powers.—*State v. Superior Court*, 76 Wash. 291, 298, 136 Pac. 147. In Washington, the superior courts are courts of general jurisdiction and, as part of their jurisdiction, have cognizance of all matters of probate, with power to exercise all the inherent functions of a court of general jurisdiction in disposing of such matters.—*State v. Kauffman*, 86 Wash. 172, 149 Pac. 656. The superior court, in a probate proceeding, can exercise all the powers of a court of general jurisdiction; its powers and its duty extend to the determination of

every matter, when properly presented for its consideration, necessary to the due administration of an estate.—*Polk v. Martin*, 82 Wash. 226, 144 Pac. 42. The superior courts are courts of general jurisdiction, having the same power and jurisdiction in probate proceedings as in actions at law or suits in equity; and their decrees in probate matters are to be accorded the same full faith and credit as judgments at law or decrees in equity.—*Wagner v. Alderson*, 91 Wash. 157, 157 Pac. 476. A probate court is not a court of limited jurisdiction, but probate matters are included in the aggregate jurisdiction of the superior courts as courts of general jurisdiction, to be exercised along with other jurisdictional powers, both legal and equitable, and as part of those general powers; and a judgment of the superior court for plaintiffs in an action to quiet title and for partition is *res adjudicata* as between the parties, although there was a will filed and not probated, and this fact would have been a good defense, if pleaded, the superior court's jurisdiction to adjudicate questions of quieting title and for partition being independent of its probate jurisdiction.—*Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811, 813. The superior court of one county of the state has no jurisdiction to set aside a decree of the superior court of another county of the state; this applies to a decree escheating to the state the property of an alien decedent.—*Doble v. State*, 95 Wash. 62, 163 Pac. 37. Jurisdiction of superior courts to distribute the estates of deceased persons among those entitled thereto.—*Christianson v. King County*, 239 U. S. 356, 370, 60 L. Ed. 327, 335, 36 Sup. Ct. 114. If a dependent child, a ward of the superior court, is conditionally awarded to the father, the court reserving control of the child in the court for one year, the jurisdiction of the court is continuing, and it has power to make such order, within that time, relative to the child's custody and residence as it deems wise, without any notice or summons required by statute as to the modification of judgments; any reasonable notice to the mother, enabling her to be heard upon the disposition of the motion for a modification of the order is sufficient. *State (ex rel. De Bit) v. Superior Court*, 103 Wash. 183, 186, 173 Pac. 1014.

(28) *Same*. Supreme court.—The supreme court, in aid of its appellate jurisdiction or in the exercise of its original jurisdiction, possesses all inherent power of courts of equity, and, when it is made to appear that a party is being denied relief to which, in equity and good conscience, he is entitled, it is that court's duty to find some method within its jurisdiction by which such relief may be granted.—*State (ex rel. Davis & Co.) v. Superior Court*, 95 Wash. 258, 163 Pac. 765.

#### 10. Exclusive, and conflicting jurisdiction.

(1) *Exclusive jurisdiction*. In general.—Probate courts have exclusive jurisdiction of the accounts of executors and administrators and the final distribution of the estates of decedents.—*Auguisola v. Arnaz*, 51 Cal. 435, 439. Probate courts do not have exclusive jurisdiction in

cases where equities are involved.—*Garces y Perea v. Barela*, 6 N. M. 239, 27 Pac. 507; *Ferris v. Higley*, 20 Wall. (U. S.) 375, 22 L. Ed. 383. The superior court of the state of California, which has charge of the administration of decedents' estates, has exclusive jurisdiction, under the present probate system, of all questions relating to the settlement and distribution of such estates; and it may, in sitting in matters of probate, exercise all equity powers necessary for a complete administration without resort to a court of equity.—*Toland v. Earl*, 129 Cal. 148, 152, 153, 79 Am. St. Rep. 100, 61 Pac. 914; *Estate of Burton*, 93 Cal. 459, 463, 29 Pac. 36. A court which has probate jurisdiction over the estate of a decedent has exclusive jurisdiction over the question of distribution thereof, and to determine all matters incidental thereto. Hence the court, in an action to foreclose the right of redemption, has no jurisdiction to determine any matter involved in the distribution of the estate.—*Estate of Freud*, 134 Cal. 333, 335, 66 Pac. 476. If the estate of the deceased is in more than one county, he having died out of the state, the probate court of the county in which application is first made for letters of administration has exclusive jurisdiction of the settlement of the estate.—*Territory v. Klee*, 1 Wash. 183, 23 Pac. 417, 418. The jurisdiction to prove wills and to grant letters testamentary is exclusively in the superior court of the county of which decedent was a resident at the time of his death, but it is for the court to which the petition is addressed to determine, from the evidence introduced before it, whether or not the deceased did, as a matter of fact, reside in the county. Its finding in the matter is conclusive on the question of jurisdiction, except upon appeal, and can not be collaterally attacked, whatever the fact may be as to residence.—*Estate of Latour*, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441; *Estate of Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381. The power to appoint administrators belongs exclusively to the probate courts. *Territory v. Mix*, 1 Ariz. 52, 25 Pac. 528. Probate courts do not have exclusive original jurisdiction over the persons of minors and of their estates. Courts of equity have complete jurisdiction over such matters.—*Wilson v. Roach*, 4 Cal. 362, 367. In Utah, the probate courts are vested with exclusive original jurisdiction of all matters pertaining to the settlement of estates of deceased persons, and while the district court, under its general equity powers, may entertain a suit for the construction of a will, yet it can not execute it.—*Allen v. Barnes*, 5 Utah 100, 12 Pac. 912. The jurisdiction of the court that first acquires it is, as a rule, exclusive.—*State (ex rel. Titlow) v. City of Centralia*, 93 Wash. 401, 161 Pac. 74. The superior court of the county in which the decedent resided at the time of his death has exclusive jurisdiction to administer the estate and to issue general letters thereon.—*State v. Kauffman*, 86 Wash. 172, 149 Pac. 656. Inasmuch as exclusive original jurisdiction was given to the superior courts in the state of Washington over the subject of probate proceedings such jurisdiction carries with it the presumption of the integrity of

the judgments of such courts, the same as is carried by the judgments of courts of general jurisdiction.—*Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 18. The execution of a deed, conveying Indian allotment lands, made by an adult heir of an Indian allottee, has the effect, when approved by the Secretary of the Interior, of terminating the jurisdiction of the federal government over such lands; after that they come under the exclusive jurisdiction of the state courts, which have jurisdiction, in a proper case, to determine the title and to set it at rest.—*Egan v. McDonald*, 36 S. D. 92, 97, 153 N. W. 915.

(2) *County courts of Oregon.*—In Oregon, the county court has exclusive jurisdiction, in the first instance, to direct and control the conduct, and to settle the accounts, of executors, administrators, and guardians, and this includes the power to inquire into a case of devastavit, and to charge the delinquent with the amount thereof.—*Steel v. Holladay*, 20 Or. 70, 10 L. R. A. 670, 25 Pac. 69. It has exclusive jurisdiction to grant and revoke letters testamentary, etc.—*Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456; but it does not have exclusive jurisdiction of an action between the administrator of a partnership estate and the administrator of an individual to determine the title to certain property, although such administrators are under the control of the county court; but such action is within the jurisdiction of the circuit court. The functions of the county court, as respect administrators and executors, are limited to the control of the transmission and disposition of property upon death of the owner, and it can not adjudicate upon collateral matters. The right of title of the decedent to property claimed by the administrator, as against third persons, or by third persons against him, must, if an adjudication become necessary, be tried in courts of ordinary jurisdiction. He is entitled to the possession of the property of his decedent, but, if it is in possession of some person who refuses to surrender to him, the county court can not aid him in obtaining such possession. It may call him to account for not doing so, but he must seek his remedy in some other court.—*Gardner v. Gillihan*, 20 Or. 598, 27 Pac. 220. The jurisdiction of the probate courts in Oregon to administer upon the estates of decedents is primary and exclusive.—*State v. First Nat. Bank*, 61 Or. 551, Ann. Cas. 1914B, 153, 123 Pac. 712, 714. Under the constitution of the state of Oregon the county court has exclusive jurisdiction in the first instance pertaining to a court of probate; that is, to take proof of wills and to grant and revoke letters testamentary, of administration and of guardianship and whenever a will is probated in such court in common form it may thereafter be contested in that court by a direct proceeding brought within one year after the probating, but the decree of the county court is immune from collateral attack.—*Mansfield v. Hill*, 56 Or. 400, 107 Pac. 474. In the state of Oregon the county court has exclusive jurisdiction in the probate of wills.—*Stevens v. Meyers*, 62 Or. 399, 126 Pac. 33.

(3) **Conflicting jurisdiction.**—A superior court of the state of California, in taking jurisdiction over an administration for the purpose of appointing a special administrator, does not thereby secure jurisdiction over the estate of the deceased for the purpose of appointing a general administrator; and it necessarily follows that such court should give way, and allow the superior court of another county to conduct the further administration of the estate, where such last-named court has first acquired jurisdiction of the estate for purposes of general administration. The proceedings are not necessarily to be dismissed, but should stand in abeyance until a final judgment has been entered in the superior court last named, holding that the said court has or has not jurisdiction over the administration of the estate.—*Estate of Damke*, 133 Cal. 430, 65 Pac. 889, 133 Cal. 433, 65 Pac. 888. In California, the superior court of the county in which the petition for letters of administration is first filed has exclusive jurisdiction to determine the question as to the residence of the decedent, and the courts of other counties must abide the determination of that court, which is reviewable only upon appeal.—*Estate of Latour*, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441; *Dungan v. Superior Court*, 149 Cal. 98, 103, 117 Am. St. Rep. 119, 84 Pac. 767. The same rule applies to the hearing and determination of the question of the residence of a minor, the need of a guardian, and the propriety of appointing a designated person as such.—*Guardianship of Danneker*, 67 Cal. 643, 645, 8 Pac. 514. That provision of the constitution of California which confers jurisdiction "in all matters of probate" upon the superior court does not mean that all superior courts in the state shall have concurrent jurisdiction in every particular probate matter. The legislature undoubtedly has the right to prescribe, by general laws, the rules which shall obtain in determining which of the many superior courts shall exercise the constitutionally conferred jurisdiction in any particular estate; and the county containing a portion of the decedent's estate, and in which application is first made, is the one which the legislature has declared to be the one which shall have exclusive jurisdiction of the settlement of the estate.—*Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767, 769. Between courts of co-equal authority, that one which first obtains jurisdiction will be permitted to pursue it to the end, to the exclusion of all others, and it will not permit its jurisdiction to be impaired or subverted by resort to some other tribunal.—*Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369. Section 1294 of the Code of Civil Procedure of California fixes the place of jurisdiction for all grants of original probate, while section 1322 of that code does the same for grants of ancillary probate of authenticated copies of wills proved and probated in foreign jurisdictions. These laws mean that the will of a resident of the state of California must be proved originally as a domestic will in the county of his residence, and that, so far as the state of California is concerned, it can not be primarily proved else-

where, and brought to that state for purposes of secondary and ancillary administration.—*Estate of Clark*, 148 Cal. 108, 111, 13 Am. St. Rep. 197, 7 Ann. Cas. 306, 1 L. R. A. (N. S.) 996, 82 Pac. 760. Under the constitution of California of 1849, probate jurisdiction was vested in the county courts, and general equity jurisdiction in the district courts, but under the present constitution both branches of jurisdiction, while remaining distinct, are administered in the superior courts. With a constitution conferring exclusive probate jurisdiction upon one court, it is not competent for the legislature to empower another court, clothed only with jurisdiction in general equity, to set aside wills obtained by fraud or undue influence, and to declare void any paper purporting to be a last will, and to set aside the probate judgments of the court constitutionally vested with probate jurisdiction, for fraud, concealment, or perjury. The statute of 1862 (Stats. 1862, p. 27), giving the district court power to set aside a will or a probate decree on the ground of fraud and the like, was unconstitutional, for the constitution gave county courts exclusive probate jurisdiction.—*Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507.

11. *Exists in what cases.*—The probate court does not have jurisdiction of all matters relating to the estates of deceased persons, but only so far as conferred by statute.—*Bush v. Lindsey*, 44 Cal. 121, 125; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703; *Grimes's Estate v. Norris*, 6 Cal. 621, 65 Am. Dec. 545. If the probate court of the county of which the decedent was a resident at the time of his death alone has jurisdiction of his estate, it follows that if, after the death of the intestate, that portion of the county in which he resided at the time of his death is erected into a new county, or is attached to another county, the probate court of the old county has jurisdiction.—*Estate of Harlan*, 24 Cal. 182, 189, 85 Am. Dec. 58. Though a probate court is without jurisdiction to set aside an order discharging an administrator of an unadministered estate, it has power, upon a proper petition, to order an administration and distribution of such estate.—*Otero v. Otero*, 11 Ariz. 260, 90 Pac. 601, 603. In Colorado, the county court, in all matters pertaining to probate business, has as ample powers and as full jurisdiction with respect thereto as have the district courts of that state over matters within their jurisdiction. Hence if a judgment is tendered for classification as a valid judgment, the county court, sitting for probate business when such judgment is tendered for classification as a claim against the estate, has power to determine the defense that the judgment was void, because rendered without jurisdiction of the defendant, the administratrix, and, if such judgment is established, to decline to classify it as a valid claim.—*Symes v. People*, 17 Colo. App. 466, 69 Pac. 312, 313. Probate courts have the undoubted right to pass upon and to allow claims against the estates of deceased persons; but it is doubtful whether they have authority, or whether the legislature, under the original act of New Mexico, could confer upon such courts the authority to entertain actions

at law to recover judgments against administrators and to enforce the collection thereof by their own executions.—*Perea v. De Gallegos*, 3 N. M. 204, 208. In the state of Washington, the probate court has jurisdiction to grant administration upon a decedent's estate, if the only property within that jurisdiction belonging to the decedent consists of real estate, and there are no creditors, and the estate is in course of administration in another state.—*Hanford v. Davies*, 1 Wash. 476, 25 Pac. 329. In that state the probate court acquires jurisdiction of the estate for the purpose of administration by the appointment and qualification of the administrator.—*Ackerson v. Orchard*, 7 Wash. 377, 35 Pac. 605. When a question arises in the administration of an estate as to whether the property shall be inventoried as a part of the estate, or not, the probate court has jurisdiction to hear evidence sufficient to determine whether the property in question belongs to the estate, or whether the estate has any interest therein, or has reasonable claim thereto, which claim may become an asset of the estate; not for the purpose of judicially determining the title of any property claimed by any third person, but to determine the good faith of the claim.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 76.

12. In particular matters.—The probate court is required to direct administrators to pay all taxes which have accrued against the estate in their hands, and is forbidden to distribute the property of the estate among the heirs and devisees until all taxes are paid.—*People v. Olvera*, 43 Cal. 492, 494. An act of a legislature of the state of Idaho, extending the jurisdiction of the probate court to try and determine actions to enforce mechanic and laborers' liens and mortgages and other liens upon real property, has been held unconstitutional and void.—*Dewey v. Schreiber Imp. Co.*, 12 Idaho 280, 85 Pac. 921. The jurisdiction of the court of probate to determine the interests of grantees of heirs or devisees depends upon the statute. In the absence of statutory authority, such court would have no power to adjudicate such a question. But the statute may confer such power.—*Snyder v. Murdock*, 26 Utah 233, 73 Pac. 22, 23. In Colorado, the county court is vested with authority to hear and determine claims against the estate of a deceased person; and one of several sureties on an obligation, who discharges the debt, may enforce contribution from the estate of a deceased co-surety, without going into a court of equity, to have the amount due from the estate determined; but he can recover from each of his co-sureties only the aliquot portion of the whole amount paid, calculated upon the basis of the number of sureties, unless it appears that some of them are insolvent, in which event he may recover from each of the solvent sureties the moiety of the whole debt, having regard only to the number solvent.—*McAllister v. Irwin's Estate*, 31 Colo. 253, 73 Pac. 47. A decree for the payment of money in probate proceedings can not be enforced as for a contempt; the proper process is an execution.—*Rostel v. Morat*, 19 Or. 181, 23 Pac. 900. In Oklahoma, the probate court has jurisdiction of

an action in replevin against a sheriff to recover personal property levied on under an execution against the property of another, where the value of the property does not exceed one thousand dollars.—*Walters v. Ratliff*, 10 Okla. 262, 61 Pac. 1070. In that jurisdiction, actions for the recovery of specific personal property in the probate courts are governed by the procedure applicable to courts of justices of the peace, where the value of the property sought to be recovered is less than one hundred dollars.—*First Nat. Bank v. Hesser*, 14 Okla. 115, 77 Pac. 36. If an attachment is properly issued after filing with the court a sufficient affidavit and bond, and property is taken thereunder, the lien of such attachment is not lost by failure on the part of the probate court or justice of the peace to make proper docket entries of the issuance of such order of attachment.—*First Nat. Bank v. Hesser*, 14 Okla. 115, 77 Pac. 36. In proper cases, the superior court of the state of California has jurisdiction to hear and determine questions relating to the rights and duties of executors and beneficiaries under wills which have been admitted to probate.—*Williams v. Williams*, 73 Cal. 99, 104, 14 Pac. 394. It is a question solely for the consideration of the probate court, whether an attorney shall be appointed to represent absent or minor heirs, and if so appointed, the amount of compensation to be allowed to him.—*Dougherty v. Bartlett*, 100 Cal. 496, 499, 35 Pac. 431. Probate courts in Kansas have jurisdiction of the allowance of claims against estates. No provision is made whereby the heirs, or those holding under them, are made parties to such procedure, and no right is given by statute to such heirs to appeal from the allowance of any claim by the probate court. In fact, they are wholly strangers to that proceeding, unless it can be said that they are represented by the administrator.—*Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239, 65 Pac. 215. Where after an administrator of the estate of an intestate had been appointed one of the heirs made charges in the administration proceedings against the other heirs that they had concealed, embezzled, and conveyed away property belonging to the estate, the charges were dismissed for want of jurisdiction.—*In re Syerley's Estate*, 87 Kan. 307, 124 Pac. 406. The statutes of Kansas conferring jurisdiction on probate courts to allow and admit to record authenticated copies of foreign wills executed and proved according to the laws of any state or territory of the United States or of any country other than the United States and territories thereof, and giving to such copies when so allowed and recorded, the same effect as if the original will had been proved in Kansas, were not intended to deny such courts jurisdiction to probate an original will executed in a foreign state or county which disposes of property situated in Kansas.—*Parnell v. Thompson*, *Thompson v. Parnell*, 81 Kan. 119, 33 L. R. A. (N. S.) 658, 105 Pac. 502. Where the court has complete jurisdiction of the subject-matter and of the parties, a decree rendered against an infant defendant is as valid and effectual as if taken against an adult, provided there is no evidence of fraud or collusion.—*Howell v. Howell*, 77 Or. 539, 152 Pac. 217.



## REFERENCES.

Jurisdiction of courts as to matters affecting the custody of minor children.—See note ante, on guardianship of minors, following table after § 69.

13. To set aside its own decrees.—A probate court has power to set aside its order, made out of court and without notice, and no notice or motion to set it aside is necessary.—*Estate of Sullenberger*, 72 Cal. 549, 552, 14 Pac. 513. Section 473 of the Code of Civil Procedure of California, relative to relieving a party from a judgment, order, or proceeding taken against him "through his mistake, inadvertence, surprise, or excusable neglect," is applicable to probate matters, and the court has jurisdiction within six months to vacate an order made by it, on motion, based upon the ground of such inadvertence, surprise, or excusable neglect.—*Levy v. Superior Court*, 139 Cal. 590, 591, 73 Pac. 417; *Cahill v. Superior Court*, 145 Cal. 42, 44, 78 Pac. 467. After a decree of distribution and discharge, and after the time specified by statute in which to seek relief from a judgment on the ground of fraud, surprise, or excusable neglect, or mistake, a probate court has no jurisdiction to set aside the decree for fraud, or because the court had been imposed upon by false testimony; but, in such cases, courts of equity have jurisdiction to afford proper relief.—*Estate of Hudson*, 63 Cal. 454, 457. When the district court has acquired jurisdiction of a cause by reason of the transfer to it from the superior court, the latter court was without jurisdiction to vacate and set aside its former order of transfer, and proceedings had in said court at a subsequent term were coram non judge.—*In re Nichol's Will (Okla.)*, 166 Pac. 1087, 1091. Courts of record, such as the probate and county courts of South Dakota, have inherent power, independent of statute, to vacate their own judgments that have been procured by extrinsic fraud and imposition upon the court; the fraudulent concealment of facts which would have caused the judgment or decree not to have been rendered will constitute extrinsic fraud sufficient to authorize the court, upon the discovery of the fraud, or when such fraud is called to the attention of the court, to vacate such judgment or decree; the filing of a fraudulent petition for administration is extrinsic fraud.—*Paul v. Paul (S. D.)*, 170 N. W. 658.

## 14. No jurisdiction when.

(1) In general.—A probate court has no jurisdiction to allow a claim against a decedent's estate for counsel fees incurred by the claimant after the death of the testator, and at a time when he was not a personal representative of the estate.—*In re Carrier's Estate*, 19 Colo. App. 245, 74 Pac. 340, 341. The district court of Kansas has no jurisdiction of an appeal to that court from an order of the probate court refusing, upon application, to revoke letters testamentary or of administration.—*Graves v. Bond*, 70 Kan. 464, 78 Pac. 851. The old probate courts of Montana had no power or authority to entertain a petition

involving the construction of a will.—*Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 385, 388. In Idaho the jurisdiction of the probate court in civil cases is limited to actions at law, where the debt or damage, exclusive of interest, does not exceed five hundred dollars.—*Dewey v. Schreiber Imp. Co.*, 12 Ida. 280, 85 Pac. 921, 923. A probate court has no jurisdiction to receive, or in any other way to act upon, an account presented by an executor of an executor against the estate of the deceased executor's testator. This is a proper case for the exercise of jurisdiction in equity.—*Wetzler v. Fitch*, 52 Cal. 638, 643; *Bush v. Lindsey*, 44 Cal. 121. In Colorado the district court is not authorized to decree that a judgment rendered by it against an administrator shall be allowed and paid as a claim of a designated class, as this is a usurpation of the province of the county court.—*Hotchkiss v. First Nat. Bank*, 37 Colo. 228, 85 Pac. 1007, 1008. An order of the probate court, requiring an executor, after he has filed his final account, to pay the moneys in his hands to the county treasurer, to be placed to the credit of heirs and devisees of the testator, is without authority of law and void.—*Estate of McMahon*, 19 Nev. 241, 8 Pac. 797. A probate court has no jurisdiction to enter an order requiring a decedent's widow to pay a designated sum of money to one who applies for letters of administration on the decedent's estate.—*Leach v. Misters*, 13 Wyo. 239, 79 Pac. 28, 29. A probate court has no power to make an order authorizing the assignment, by an administrator, of a bond of indemnity given to the decedent in his lifetime as sheriff.—*McDermott v. Mitchell*, 53 Cal. 616, 618. It has no power to authorize a special administrator to defray the expenses of a controversy in a probate proceeding, unless expressly authorized to do so by statute.—*Henry v. Superior Court*, 93 Cal. 569, 571, 29 Pac. 230. A probate court has no jurisdiction, in any case, to make partition, in probate proceedings, among the heirs of a decedent as to interests held in common with strangers, unless the petition therefor is filed before the entry of the final decree of distribution. The rights of such parties should be settled by a suit for partition, in which all persons having any interest in the lands may be made parties; and a writ of prohibition will lie to restrain the probate court from making partition.—*Buckley v. Superior Court*, 102 Cal. 6, 10, 41 Am. St. Rep. 135, 36 Pac. 360. The probate court is not a court of equity, and it has no power to foreclose a mortgage.—*Meyers v. Farquharson*, 46 Cal. 190, 200. A probate court has no jurisdiction or authority in the administration of an estate of a decedent to order or confirm the sale of real estate which belongs to some one else, and the title to which is vested in another, and which property did not in fact or law belong to the estate being administered.—*Douglas v. Douglas*, 22 Ida. 336, 125 Pac. 796.

(2) In county in which estate has not been "devised."—Under the Oregon statute, where the testator had not "devised" any real property in a designated county, the county court of that county does not have jurisdiction of the estate, and has no power to appoint an administra-

tor; and, this fact being apparent from an inspection of the record, such court may properly set aside its order appointing an administrator.—*Henkle v. Slate*, 40 Or. 349, 68 Pac. 399, 400. The county court, empowered to admit the will of a testator to probate, being authorized to grant administration of the estate of an intestate, the statute prescribing the county in which the will must be probated necessarily controls in determining the particular court possessing the requisite power to grant administration of the estate of an intestate.—*Henkle v. Slate*, 40 Or. 349, 68 Pac. 399.

(3) *Over proceeds of life-insurance policy.*—A probate court has no jurisdiction over a contest involving the proceeds of a life-insurance policy, made payable, by its terms, to the widow and minor children of the deceased.—*Heydenfeldt v. Jacobs*, 107 Cal. 373, 378, 40 Pac. 492. The proceeds of the two mutual benefit certificates standing in the name of a testator at the date of his death held not to be a part of his estate and consequently were not within the jurisdiction of the probate court, though they had been paid over to the administrator. Such proceeds can be disposed of only in accordance with the by-laws, rules, and regulations of the organizations issuing the certificates, subject to change by the beneficiary in certain methods therein mentioned. The by-laws provided that the proceeds should go only to blood relations of the beneficiary. Appellants were strangers in blood to testator. Respondents were his heirs at law, but they claimed that the proceeds, though no part of the estate, should be distributed to them by the probate court as the heirs of decedent, which the appellate court held that court had no jurisdiction to do. Whether the bequest in the will amounted to a change in the disposition of the proceeds within the by-laws of the organizations was not decided.—*Finn v. Walsh*, 19 N. D. 61, 64, 121 N. W. 766.

#### REFERENCES.

Money paid on an insurance policy is not an asset of the estate.—See note § 378, head-line 1, subd. 6, post.

(4) *To foreclose mortgage.*—A probate court has no jurisdiction to foreclose a mortgage against the estate of a decedent. Such a matter is one purely of equitable cognizance.—*Willis v. Farley*, 24 Cal. 490, 499; *Harp v. Calahan*, 46 Cal. 222, 231.

(5) *To order property to escheat when.*—In Washington, where the estate of the deceased is in more than one county, he having died outside of that state, the probate court of the county in which application is first made for letters of administration has exclusive jurisdiction of the settlement of the estate; and where one court has acquired jurisdiction of the estate, another court of that state is not authorized to assume jurisdiction of the estate, and to order that it escheat to the state.—*Territory v. Klee*, 1 Wash. 183, 23 Pac. 417, 418.

(6) *Over timber-culture claimant's claim.*—The county court of Oregon does not have jurisdiction of a timber-culture claimant's claim, where such claimant died before performance, by him, of the conditions precedent to obtaining title from the government, because there was, at such time, no interest which could be devised or which would descend or pass to the claimant's heirs or personal representatives; and the proceedings of the court in assuming jurisdiction over the claim and authorizing its sale are absolutely void for want of jurisdiction of the subject-matter, as the claim at that time belonged to the heirs in their own right.—*Haun v. Martin*, 48 Or. 304, 86 Pac. 371, 373.

(7) *To appropriate share of heir or devisee to payment of his debts.*—While a probate court has power to pay claims against the estate, and to distribute the remainder among heirs and devisees, or to direct the administrator to do so, it has no power to appropriate the share of an heir or of a devisee to the payment of his debts. Hence if one of the devisees is confined in the state prison for a term less than life, such devisee is not dead in law, although his civil rights in some matters are suspended, and the probate court has no power to appropriate his share of an estate to the payment of his debt, although such debt is in judgment. The probate court may pay the debts of the dead, but not of the living.—*Estate of Nerac*, 35 Cal. 392, 397, 95 Am. Dec. 1011.

(8) *Where deceased was a non-resident.*—The probate court of a county in Kansas has no jurisdiction over the estate of a deceased resident of that state, to appoint an executor or administrator, or to prove a will, unless the deceased was, at the time of his death, an inhabitant or a resident of the county of such probate court.—*Ewing v. Mallison*, 65 Kan. 480, 70 Pac. 369, 371. Where a person dies intestate, who was not a resident or inhabitant of the state at the time of his death, and who left no estate within the state to be administered, a probate court of such state has no jurisdiction to issue letters of administration on the estate of such intestate; and where letters are issued under such circumstances, the act of the court in doing so is utterly null and void.—*Mallory v. Burlington, etc.*, R. R. Co., 53 Kan. 557, 36 Pac. 1059. The word "resident" as used in the statute of the state of Washington, providing that wills shall be proved in the county in which decedent was a resident at the time of his death, means a strict legal residence or domicile and though ordinarily the domicile of the husband is that of the wife, where the husband has deserted the wife she may acquire a domicile or residence of her own, which will govern in the matter of probate proceedings in her estate.—*Buchholz v. Buchholz*, 63 Wash. 213, Ann. Cas. 1912D, 395, 115 Pac. 88, 90.

(9) *Of body of deceased.*—The body of one whose estate is in probate unquestionably forms no part of the property of that estate. The individual has a sufficient proprietary interest in his body after his death to be able to make a valid and binding testamentary disposition of the same. The court in probate, and the personal representatives, acquire

jurisdiction from the last testament to see that its provisions in this regard, as in all others, are duly executed; but, where the will is silent, the court in probate has no such power. In such a case neither the court in probate nor the personal representative has any right to control the manner of disposition of the remains, nor to dictate the place of interment. The proper expenses of such disposition may well be a charge against the estate, but the duty and right of burial are quite different things from auditing or paying the expenses of such burial.—*O'Donnell v. Slack*, 123 Cal. 285, 288, 290, 43 L. R. A. 388, 55 Pac. 906.

## REFERENCES.

Injunctive relief as to cemetery property, burials, or removal of remains.—See note 3 L. R. A. (N. S.) 481-495.

(10) To administer a living person's estate.—A probate court has no power to administer upon the estate of a living person. Such administration is totally void.—*Stevenson v. Superior Court*, 62 Cal. 60, 64; *Fay v. Costa*, 2 Cal. App. 241, 83 Pac. 275; *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. 1108. A court has power to right an injury done in an effort to administer upon the estate of a living person, and may declare the grant of administration in all subsequent proceedings in such case void; but if the matter is a probate proceeding, where the administrator was served with a citation only in the matter of the estate, which does not require him to answer, and which did not notify him that judgment would go against him for want of an answer, the court exceeds its jurisdiction in directing the administrator to pay to the owner of the estate a designated sum of money and costs, and in directing its clerk to issue execution for that sum. Such an order will be annulled and vacated on a writ of review.—*Costa v. Superior Court*, 137 Cal. 79, 82, 69 Pac. 840.

## REFERENCES.

Executor or administrator of estate of a living person.—See note 30 Am. Rep. 748-752. Right to and effect of administration on the estate of a person presumed to be dead.—See notes 3 Am. & Eng. Ann. Cas. 1126, 7 Am. & Eng. Ann. Cas. 881. Power to administer on estate of living person.—See note § 378, head-line 1, subd. 1, post.

(11) To adjust disputed rights generally.—The probate court has no jurisdiction, save in certain excepted instances, to determine disputes between heirs or representatives of the deceased and third persons.—*Theller v. Such*, 57 Cal. 447, 459; *In re Singleton's Estate*, 26 Nev. 106, 64 Pac. 513. It has no jurisdiction of an action brought by attorneys to recover on a contract with a legatee for the collection of legacies, although the controversy concerns a fund which is in the possession of the court, acting in its probate capacity, and notwithstanding the fact that such court has power to distribute the fund as between the parties.—*In re Gorkow's Estate*, 28 Wash. 65, 68 Pac. 174, 175. While

probate courts have all the powers of a court of equity in the settlement of estates, the conflicting interests of heirs or lienors, no matter what their nature or origin, can only be determined in an appropriate proceeding under proper pleadings.—*Estate of Heeney*, 3 Cal. App. 548, 86 Pac. 842, 844. Probate courts are without jurisdiction to determine successive claims of title to property as between an estate and a stranger.—*Caron v. Old Reliable Gold Min. Co.*, 21 N. M. 211, 78 Pac. 63. Under its probate jurisdiction, the court can not bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or administrator, or for the purpose of determining their rights to the proceeds of a sale derived under those for whose benefit the sale was ordered.—*Curtis v. Schell*, 129 Cal. 208, 221, 79 Am. St. Rep. 107, 61 Pac. 951. A probate court has no power to enforce the payment of a debt by commitment as for a contempt.—*In re Wolford*, 10 Kan. App. 283, 62 Pac. 731. It has no jurisdiction to determine the right to real estate as between the administrator and the decedent's husband, who asserts an adverse claim.—*Stewart v. Lohr*, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457. It has no power to strike from the inventory property listed by the administrator, where there is a dispute between him and another as to the possession thereof.—*In re Bolander's Estate*, 38 Or. 490, 63 Pac. 689, 690. When the fact of the conveyance of the share of an heir, devisee, or legatee in an estate is in dispute, the provisions of section 1678, Code of Civil Procedure of the state of California, do not apply and the determination of such validity is not a matter within the probate jurisdiction of the superior court.—*Estate of Howe*, 161 Cal. 152, 118 Pac. 515.

(12) To try title.—The probate court is without jurisdiction to try title to property as between the representatives of an estate and strangers thereto.—*Stewart v. Lohr*, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457; *In re Wolford*, 10 Kan. App. 283, 62 Pac. 731; *In re Bolander's Estate*, 38 Or. 490, 63 Pac. 689; *Falke v. Terry*, 32 Colo. 85; 75 Pac. 425, 427. When a probate court orders a sale of the land of a third person to pay the debts of a decedent, such order is void for want of jurisdiction over the property. As such court has no power to sell the lands of another, and no power to pass upon the question of title, the order is void, and would be void although the real owners of the property were parties to the proceeding, and therein contested the question of title. A probate court has no jurisdiction to try such an issue.—*Gjerstadengen v. Van Duzen*, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233. A foreign executor, who comes into another state to reside, and who brings with him property belonging to the estate, can not be made liable in the latter state, upon the suit of a local creditor of the testator, to the extent of the property brought therein, but may be to the extent of the property already there. The courts of a state, other than that of the domiciliary jurisdiction, have no power to try the title of real estate situate in the latter state, where the action is one between legatees under a will, and a foreign executrix, who is charged

with a conversion of the personal assets of the estate, in fraud of the rights of the heirs; and the action of the court in trying and adjudicating the title of real estate situate in another state can not be upheld.—*Falke v. Terry*, 32 Colo. 85, 75 Pac. 425, 427. A court, while sitting as a court of probate, has no other powers than those given to it by the statute, and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction which is conferred upon it. It has no power to determine disputes between heirs or devisees and strangers as to the title to property.—*Smith v. Westfield*, 88 Cal. 374, 378, 26 Pac. 206; *In re Haas*, 97 Cal. 232, 234, 31 Pac. 893. The county court in the state of Oregon has no power or authority to determine a dispute between an administrator and a third person, concerning the title to property, but such question must be tried in a court of ordinary jurisdiction.—*Harrington v. Jones*, 53 Or. 237, 99 Pac. 936.

(13) *To enforce a trust.*—There are many proceedings which relate to the estates of deceased persons of which the probate courts have no jurisdiction. They have no jurisdiction to enforce a trust by compelling an administrator to convey property by him held in trust, and to render an account of the money received by him from the property. Such an action is within the domain of equity.—*Haverstick v. Trudel*, 51 Cal. 431, 434.

(14) *In what matters of guardianship.*—The determination of the question of title to property is one of the many matters relating to the estates of deceased persons of which the probate court has no jurisdiction; and if an executor, upon the settlement of his annual account, alleges that property, which a legatee under the will claims to belong to the estate, is the property of his ward, and that he holds it as her guardian, and that he had returned it to the court in his inventory and appraisement of the estate of the ward, and had objected to the jurisdiction of the probate court to hear and determine the question, an issue is thereby raised as to the legal title to the property, which the probate court has no jurisdiction to hear and determine.—*Estate of Haas*, 97 Cal. 232, 234, 31 Pac. 893. The probate court has no jurisdiction, in settling the accounts of the guardian, to render judgment against the ward for advances made by the guardian after the ward attains his majority. When the guardian assumes his office, he contracts not only to manage the estate according to law, and for the best interests of the ward, but also that at the termination of his trust he will account for the property, estate, and moneys of the ward in his hands, and to pay over and deliver such as remains to the person entitled thereto. This is the account which the probate court has jurisdiction to determine. No jurisdiction is given to ascertain a balance against a former ward, except as that will tend to show what the guardian must pay or deliver to his former ward. It is in the nature of a proceeding in rem, and the estate is the res, and, after

majority, the only matter of which the court has jurisdiction.—*Estate of Kincaid*, 120 Cal. 203, 52 Pac. 492, 493. An order of the probate court, in a guardianship proceeding, made without authority of the statute, is void.—*Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888, 891. In Kansas, ample authority is vested in the probate court to make all proper and just orders in respect to the estates of lunatics, and, in the absence of special reasons therefor, the district court should not be called on to interfere. A court of general chancery is not, perhaps, entirely divested of jurisdiction in cases of guardianship by the creation of a statutory court for the control of the ward's property, but such jurisdiction as it has is reserved to it in extraordinary cases and for special reasons; and, in accordance with this principle, it has been held that, where a decedent's estate is still unsettled, the administrators still acting, and no special reason shown why the jurisdiction of the probate court should not be invoked, the district court will not make orders affecting the administration of the estate. Hence, the district court does not have jurisdiction to entertain an action to subject funds in the hands of a guardian of an insane person to the payment of the latter's debts, when the creditor does not have a lien on such funds, and there exists no special or extraordinary reason preventing the probate court from making the desired order if it be a proper and just one to make.—*Hill Inv. Co. v. Honeywell*, 65 Kan. 349, 69 Pac. 334. The superior court, sitting in probate, has no jurisdiction to appoint a guardian ad litem for an alleged insane person who has not been a party to the action.—*Boyd v. Dodson*, 66 Cal. 360, 5 Pac. 617.

(15) *Contempt*.—The judges of the probate courts, as well as other courts, have jurisdiction over matters of contempt, but it must be exercised in accordance with the provisions of the statute; when the contempt is not committed in the immediate view and presence of the court, or judge, no jurisdiction is acquired by any court, whether district, probate, or justice's, until the affidavit required by the statute is presented.—*Harkness v. Hyde*, 31 Ida. 784, 176 Pac. 885.

15. *Collateral attack*.—The orders and judgments of probate courts in regard to probate matters can not be collaterally attacked, except for want of jurisdiction in the court. The remedy of one aggrieved thereby is by a proper motion in the court, or by appeal.—*Dennis v. Winter*, 63 Cal. 16, 18; *Clark v. Rossler*, 10 Ida. 348, 3 Ann. Cas. 231, 78 Pac. 358; *Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767; *Symes v. People*, 17 Colo. App. 466, 69 Pac. 312, 313. Even the determination of the court that it has jurisdiction must be made from evidence produced before it, and such determination is valid until set aside in some proper manner, notwithstanding the court was mistaken in its view of the evidence, or that other evidence could have been produced which would have required a different determination. The court's judgment that it has jurisdiction can not be collaterally



attacked.—*Estate of Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381; *Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767, 769. A decree of a probate court can not be collaterally attacked for want of jurisdiction, unless the same appears on the face of the proceedings, or because of any error or irregularity; but the decree, if not totally void, is conclusive on collateral attack so long as it remains in force. "If it be found that the tribunal is one competent to decide whether the facts in any given matter confer jurisdiction, it follows with inexorable necessity that if it decides that it has jurisdiction, then its judgments, within the scope of the subject-matter over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed or avoided for error or fraud in a direct proceeding. It matters not how erroneous the judgment. Being a judgment, it is the law of that case, pronounced by a tribunal created for that purpose. To allow such judgment to be questioned or ignored collaterally would be to ignore practically, and logically to destroy, the court. And it is not necessary that the facts and circumstances upon which the jurisdiction depends shall appear upon the face of their proceedings, because, being competent to decide, and having decided, that such facts exist, by assuming the jurisdiction, this matter is adjudicated, and can not be collaterally questioned."—*Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 682, 685, quoting from 1 Woerner on Law of Administration, § 145. Where the want of jurisdiction appears on the face of the record a decree of the county court ordering a sale of decedent's real estate is void and can be attacked either directly or collaterally; but if the jurisdictional infirmity could be discovered only by evidence aliunde the record, then the decree was not void but voidable and was good until set aside by direct attack.—*Pinnacle Gold Mining Co. v. Popst*, 54 Colo. 451, 131 Pac. 417. Where the probate court has jurisdiction of both the parties in interest and the subject-matter, though what the court does may be erroneous, it is not void and is not subject to collateral attack.—*Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 18. The judgments and orders of the county courts of the state of Oregon sitting in probate can not be collaterally impeached except where the want of jurisdiction affirmatively appears upon the face of the record.—*Smith v. Whiting*, 55 Or. 393, 106 Pac. 793. When an application is presented to the probate court for the appointment of an administrator of a surviving partnership and the court finds the existence of the facts authorizing it to exercise jurisdiction, the action of the court in making the appointment is not subject to collateral attack.—*Parnell v. Thompson*, *Thompson v. Parnell*, 81 Kan. 119, 33 L. R. A. (N. S.) 658, 105 Pac. 502. If the statute governing the publication of citation to heirs has been fully complied with and the court has once acquired jurisdiction of the proceedings, begun by the filing of an application for leave to sell real estate by an executor, an order of sale thereafter prematurely made renders the

sale following not void, but merely voidable; it is therefore not subject to collateral attack.—*Stadelman v. Miner*, 83 Or. 348, 155 Pac. 708, 163 Pac. 585, 983. An answer which challenged the action of the probate court of another state in appointing an administrator of the estate of a decedent, a resident of that state at his death on the ground that the decedent did not possess any real or personal property at the time of death, was a collateral attack and it was not error to sustain a demurrer thereto.—*Chicago R. I. & P. Ry. Co. v. Forrester* (Okla.), 177 Pac. 593, 594. The approval of a conveyance of a full-blood Indian heir, such approval having been made by a county court not having jurisdiction of the settlement of the estate of a deceased allottee, is unauthorized and void, and may be collaterally attacked.—*Groom v. Dyer* (Okla.), 179 Pac. 12. Where the judgment of a court probating a will, closing the estate, and discharging the executor, is regular and valid upon its face, it is not subject to a collateral attack, such as was made in this case.—*Lucas v. Lucas* (Okla.), 163 Pac. 943. Orders and judgments procured by fraud are void and subject to collateral attack.—*Winters v. Oklahoma P. C. Co.* (Okla.), 164 Pac. 965. If a want of jurisdiction to enter the particular order or judgment is affirmatively shown by the record proper upon which that order or judgment is based, such order or judgment is void and subject to collateral attack.—*Winters v. Oklahoma P. C. Co.* (Okla.), 164 Pac. 965. An order issued by a probate court, though irregular and not in the ordinary form, is valid as against a collateral attack, if its language is sufficient to clearly indicate its purpose and to denote its character.—*Lowery v. Parton* (Okla.), 165 Pac. 164. The judgment of the county court attempting to decree a partition of restricted Indian lands is void, and may be attacked collaterally, notwithstanding the fact that the records of the partition proceedings do not disclose that such lands are restricted.—*Lewis v. Gillard*, *Gardner v. Lewis* (Okla.), 173 Pac. 1136.

#### 16. Jurisdiction in equity.

(1) *In general.*—A proceeding in the county court, sitting in probate, is substantially a suit in equity.—*Luse v. Webster*, 74 Or. 489, 494, 145 Pac. 1063. The proof of wills is classed as an equity proceeding.—*Stevens v. Myers*, 62 Or. 372, 413, 121 Pac. 434, 126 Pac. 29. The state as *parens patriae* exercises, by equitable proceedings, a general supervision over all minors neglected by their parents, and is theoretically their guardian.—*Ex parte Bowers*, *Bowers v. Grant*, 78 Or. 390, 153 Pac. 412. Where a man and his wife have been divorced, and she sues in equity to recover her interest in community property; where the husband is dead and other parties intervene, settling up their claims to such property; such court of equity, having acquired jurisdiction, will retain it to the end that complete justice may be done.—*Johnson v. Garner* (Nev.), 233 Fed. 756, 766. A party can not, as a matter of right, demand a jury trial when the district court enter

tains an equitable review of an administration had in the probate court.—*Chapman v. Kennett*, 94 Kan. 535, 146 Pac. 1153.

(2) *Exists when.*—When there are peculiar circumstances of embarrassment to the administration of an estate, and when the assuming of jurisdiction would prevent great delay, expense, inconvenience, or waste, and thus conclude by one action and decree a protracted and vexatious litigation, a court, in the exercise of its equitable powers, may take jurisdiction of the settlement of such estate.—*Deck v. Gerke*, 12 Cal. 433, 437, 73 Am. Dec. 555. The jurisdiction of the probate court is limited to those matters over which the statute directs it to exercise jurisdiction.—*Bush v. Lindsey*, 44 Cal. 121, 125. Hence, where jurisdiction is not conferred upon the probate court by statute, a court of equity has jurisdiction of actions against the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator.—*Bush v. Lindsey*, 44 Cal. 121, 124. A court of equity has jurisdiction to enforce a trust, by compelling the administrator to convey property, held by him in trust, to the heirs of the intestate, and to order him to account for money received by him for the property.—*Haverstick v. Trudel*, 51 Cal. 431, 433. And the rights of representatives or successors of several partners can be determined only in a court of equity.—*Theller v. Such*, 57 Cal. 447. The jurisdiction vested in the old probate courts did not divest the old district courts of their general jurisdiction as courts of chancery over actions for a settlement of affairs of a partnership.—*Griggs v. Clark*, 23 Cal. 427, 429. If a guardian dies, without settlement of his guardianship in a probate court, his executors have no authority to present his final account to the probate court for settlement for charges made by him against the ward, either during or after his nonage; and the court has no authority to receive or in any way to act upon it. This settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and the necessary parties.—*Estate of Allgier*, 65 Cal. 228, 3 Pac. 849, 850. In Oklahoma the appointment of a receiver is the exercise of chancery power, and such power can not be conferred upon or exercised by the probate courts.—*Garrett v. London, etc., Fire & Ins. Co.*, 15 Okla. 222, 81 Pac. 421. If property be omitted from an administrator's account, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree and administer upon the omitted property; a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity.—*Pickens v. Merriam* (Cal.), 242 Fed. 363, 370, 155 C. C. A. 139. Where an Indian mistakenly believed that he owned only a one-half interest in certain land, and executed a deed with the intention of conveying such one-half interest, which deed, however, conveyed the entire estate, the grantor is entitled to relief in equity, by way of reformation of

the deed, so that it will convey only a one-half interest.—*Barnett v. Kunkle* (Okla.), 256 Fed. 644. In a case where the executor or administrator neglects or refuses to proceed to reduce a partnership interest of the deceased into assets of the estate, the heir may, by a resort to equity, have it so reduced and included in such assets, the suit being in aid of administration only.—*Hadley v. Hadley*, 73 Or. 179, 144 Pac. 80. A court of equity, rather than of law, is properly invoked to uncover the fraud underlying matters of a bank's business shown as regular on the books of the institution.—*Sargent v. American B & T. Co.*, 80 Or. 16, 154 Pac. 759, 763, 156 Pac. 431. Courts of equity have jurisdiction over all trusts to compel an accounting, and this jurisdiction may be invoked wherever any confidential or fiduciary relation exists, in case a duty arising out of it rests upon one of the persons concerned in favor of the others.—*Campbell's Automatic S. G. B. Co. v. Hammer*, 78 Or. 612, 153 Pac. 475. Where a separation agreement has been fully executed, and one of the parties to it is dead and the other is making unwarranted claims in probate upon the estate of the deceased, and his representative interposes the separation agreement as a defense by way of estoppel to those claims, the probate court has equitable jurisdiction for the purpose of passing upon the validity and effect of such agreement.—*In re Yoell's Estate*, 164 Cal. 540, 129 Pac. 999. The rendition of a deficiency judgment in proceedings to foreclose a deed of trust is not enough to start the statute of limitations in favor of the heir of one, since deceased, who had bound himself to pay any such deficiency; the remedy against such heir is in equity only.—*Sullivan v. Ellis* (Colo.), 219 Fed. 694, 135 C. C. A. 366. A court of equity has jurisdiction to correct mistakes in a trust deed voluntarily made and testamentary in character, when the mistake is apparent on the face of the instrument or may be made out by a due construction of its terms.—*Bertelmann v. Cockett*, 24 Haw. 230, 238. A court of equity has jurisdiction to correct mistakes in a will when the mistake is apparent on the face of the will or may be made out by a due construction of its terms; but the mistake must be apparent on the face of the will; otherwise, there can be no relief, for parol evidence, or evidence dehors the will is not admissible to contradict, vary, or control the words of the will, although it is in certain cases admissible to explain the meaning of the words which the testator has used.—*Bertelmann v. Cockett*, 24 Haw. 230, 236. Courts of equity possess a continuing jurisdiction over the custody of children and an inherent power to amend, modify, or annul orders of custody which, in their nature, are but temporary, as the welfare of such children, under changing conditions, may demand.—*Stewart v. Stewart*, 32 Ida. 180, 180 Pac. 165.

(3) Does not exist when.—In California, it seems that no independent suit in equity lies to construe a will.—*Toland v. Earl*, 129 Cal. 148, 151, 79 Am. St. Rep. 100, 61 Pac. 914; but see *Siddall v. Harrison*, 73 Cal. 560, 15 Pac. 130; *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *Rosenberg v. Frank*, 58 Cal. 387. Nor can a suit in equity be maintained

for the purpose of determining heirship, pending proceedings in probate for the settlement of an estate, where no special reasons are given why such a matter should be determined prior to the final decree of distribution in a probate proceeding.—*Siddall v. Harrison*, 73 Cal. 560, 562, 15 Pac. 130. A proceeding to set aside administration of the estate of a living person is a probate proceeding, and can not be treated as a suit in equity, especially where the administrator was not served with summons, but with a citation, which did not require him to answer, and which did not notify him that, in case of failure to do so, judgment would go against him.—*Costa v. Superior Court*, 137 Cal. 79, 82, 69 Pac. 840. In the absence of fraud, a court of equity has no power to review the orders of a probate court.—*Dougherty v. Bartlett*, 100 Cal. 496, 499, 35 Pac. 431. A court of equity is not a proper forum in which to set aside a probate decree obtained by fraud, and without notice to the party against whom it was rendered.—*Baker v. O'Riordan*, 65 Cal. 368, 371, 4 Pac. 232; *Sanford v. Head*, 5 Cal. 297. A probate court in Kansas has no equitable jurisdiction, and a district court in that state, on the trial of an appeal de novo from a probate court, has such powers and jurisdiction only as had the court from which the appeal was taken.—*Ross v. Woollard*, 75 Kan. 383, 89 Pac. 680. A court of equity has no jurisdiction to determine the existence of a claim against the estate of a decedent who died intestate, but it will assume jurisdiction, in aid of law and as supplementary thereto, to bring into administration, to pay debts established in course of administration, property in equity belonging to such estate, but held by a third person through a fraudulent conveyance made by such intestate.—*Johnson v. Rutherford*, 28 N. D. 87, 101, 147 N. W. 390. A court of equity, as such, has no power to determine the validity of a will, alleged to have been obtained by fraud; nor to set aside its probate on that ground; a special tribunal, the superior court, with general jurisdiction, both legal and equitable, has been intrusted with such power.—*In re Hoscheid's Estate*, 78 Wash. 309, 322, 139 Pac. 61. A bill in equity is demurrable if it does not show that the complainant has an interest in the subject-matter of the suit; the next of kin of a living person has no estate or interest at law or in equity in the property of that person; *nemo est haeres viventis*.—*Kalaniana'ole v. Lilluokalani*, 23 Haw. 457, 468. A court of equity has no jurisdiction to construe a will where the claims of the parties are of a strictly legal character and no trust is involved; nor, in the absence of statute, have probate courts such jurisdiction except to such incidental extent as may be necessary in the exercise of their general jurisdiction over the ordinary administration of estates.—*Estate of Kalena*, 24 Haw. 148, 150.

(4) Where same court has jurisdiction in equity and in matters of probate.—In California, where the same superior court has jurisdiction both in equity and in matters of probate, and the jurisdiction of the court as to matters of accounting between the estate of a deceased administrator and his successor is admitted, a court can administer full

and entire relief according to the principles of equity, and also in accordance with the statutes which exist with reference to the matters of probate or any others within the court's jurisdiction. Hence, it may, as a court of equity, determine the amount due the attorney of the deceased administrator, and may withhold for future determination, by the probate court, the question as to the amount of commissions due to the deceased administrator upon final settlement of the estate.—*Pennie v. Roach*, 94 Cal. 515, 521, 29 Pac. 956, 30 Pac. 106. While it is true that the probate and equity jurisdictions of the superior court are separate and distinct, that the former furnishes a method of administering the affairs of a decedent, and that when final distribution has been had its jurisdiction is exhausted, yet it is the peculiar province of a court of equity to appoint and control trustees for the management of trust estates, and, under our system, the same tribunal exercises equity and probate jurisdiction. Hence, if an objection to the jurisdiction of a probate court is raised for the first time in the appellate court, such objection is held to have been waived by the appearance of the defendant without objection to the form of the petition filed in probate, asking for the accounts and removal of the trustees, etc. The petition, under such circumstances, is to be regarded as a bill in equity addressed to the equitable powers of the superior court, and the form of its title is immaterial.—*Estate of Thompson*, 101 Cal. 349, 354, 35 Pac. 991, 36 Pac. 98, 508. The superior court of California, sitting as a court of probate, assumes a special and limited jurisdiction under statutory procedure, and, although guided by principles of equity in the exercise of that jurisdiction, does not exercise its general jurisdiction in equity, but is limited to matters in probate, and, in the administration of the estates of decedents, to the objects of such administration. These objects are the temporary preservation and protection of the estate of the deceased, the satisfaction or payment of such debts and claims as are charges or liens upon it, and the distribution of the residue to those who are entitled thereto. Incidentally, the expenses incurred in the administration, and the temporary provision for the support of the family, including a homestead where proper, are to be taken from the estate. This provision, however, is, in reality, a distribution of a portion of the estate to those who, by virtue of the statute, are entitled thereto. If it is necessary or proper to appeal to a court of chancery, the probate court is such a court, at least so far as matters in probate are concerned; but, while probate courts have all the powers of a court of equity in the settlement of estates, yet conflicting interests must be determined by appropriate proceedings, under proper pleadings, even in that court.—*Estate of Heeney*, 3 Cal. App. 548, 86 Pac. 842, 844; *Curtis v. Schell*, 129 Cal. 208, 220, 79 Am. St. Rep. 107, 61 Pac. 951; *Toland v. Earl*, 129 Cal. 148, 153, 79 Am. St. Rep. 100, 61 Pac. 914. Wherever it appears that there is a want of jurisdiction in the proceeding for the administration of the estate, the jurisdiction of a court of equity may properly be invoked and exercised, as where

it becomes necessary to determine the rights of strangers to the estate, or to bring them in for the purpose of determining their rights to the proceeds of a sale derived under those for whose benefit the sale was ordered.—*Curtis v. Schell*, 129 Cal. 208, 221, 79 Am. St. Rep. 107, 61 Pac. 951. But no action in equity brought in the same court which has probate jurisdiction over the estate to obtain from that court, sitting in equity, a construction of the will, for the edification of the same court sitting in probate, can be entertained. It is the province of the probate court which settles the estate of a deceased person to construe the will and the trusts created thereby; and it may exercise all equity powers necessary to that end.—*Toland v. Earl*, 129 Cal. 148, 153, 79 Am. St. Rep. 100, 61 Pac. 914.

(5) *Concurrent jurisdiction.*—The district courts of Kansas have jurisdiction, concurrently with the probate courts, of certain matters relating to the estates of deceased persons; and, in the exercise of their equity or chancery jurisdiction, the district courts may entertain and determine actions to foreclose mortgages, where the defendant is a legal representative of a deceased person, or any other proper proceeding over the estates of deceased persons, and over the legal representatives and heirs of decedents. The district courts of that state have full chancery powers, and courts of equity in that state have always had a paramount jurisdiction over the estates of deceased persons. These powers are not taken away by the statutes regulating the duties and defining the powers of the probate court. In that state, when certain facts exist, growing out of the liabilities of a deceased person, or, it may be, arising out of the settlement of the estate of a deceased person wherein the probate court, by reason of its limited and restricted authority, can not protect and enforce the rights of all persons involved in the controversy, the equitable power of the district court may be invoked in their behalf. Hence, the district courts of that state have jurisdiction to entertain and enforce a demand against the property of a deceased person, who, by will, devoted almost his entire estate to the perpetuation of a banking business in which he had been engaged, during his lifetime, and whose continuance he committed to executors named in his will; the claim sought to be enforced in the district court having originated in the course of the banking business, some years after the death of the testator, and after all debts of the testator existing at the time of his death had been paid.—*In re Hyde*, 47 Kan. 277, 27 Pac. 1001, 1002. In Nevada, where a probate court has jurisdiction, and can administer full relief, a court of equity has discretion to assume jurisdiction or to turn the parties over to the probate court. If others than the decedent are necessary parties to a foreclosure suit, the proceeding must be in equity, and not in the probate court. And if a mortgagee only and the representatives of the deceased mortgagor are parties, courts of equity and the probate court have concurrent jurisdiction.—*Corbett v. Rice*, 2 Nev. 330.

(6) *Of federal courts.*—It is settled law that federal equity jurisdiction extends to the administration of the estates of deceased persons, where it concerns citizens and residents of different states; but in exercising such jurisdiction in the enforcement of claims against the personal representatives of decedent's estate, federal courts administer the law of the state of the domicile, and are governed by the local rules and regulations applicable in the adjustment of such claims.—*Schwarz v. Harris* (Or.), 206 Fed. 936, 939. The general equity jurisdiction of the circuit court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction, can not be defeated or impaired by the laws of a state undertaking to give exclusive jurisdiction to its own courts.—*Johnson v. Johnson* (Nev.), 225 Fed. 413, 419. In equity cases, the federal courts are not bound by the statute of limitations; in those courts the question of laches is paramount, though they will act, or refuse to act, in analogy to such statute.—*Sullivan v. Ellis* (Colo.), 219 Fed. 694, 698, 135 C. C. A. 366. A federal court may entertain jurisdiction of a suit by a distributee, he being a citizen of another state, to establish his rights to a share in the estate of a deceased person, although the estate is still pending for settlement in probate, and may enforce its adjudication against the administrator personally, or his sureties, or against any other party subject to liability, or in any other way which does not disturb the possession of the property by the state court.—*Maling v. Maling* (Or.), 217 Fed. 127, 129. A federal court will not disturb the decree of a state probate court by annulling or supervising the same, but it may declare, as a court of equity, in a proceeding properly before it, that an administrator, who had obtained a decree of distribution of the property of the estate to himself and others by false statements, is a trustee; that false representations by him that he was next of kin were a breach of his trust as administrator; and that he be deprived of any benefit or fruits of the fraudulent judgment.—*Diamond v. Connolly*, 251 Fed. 234, 163 C. C. A. 390. A federal court, has no power to seize and control property while in the custody of a state court, but where the federal court has already acquired jurisdiction of property, and the owner of such property afterwards dies, it has power to do equity without transferring the case to the probate court; but, if any residue remains after exercising such jurisdiction, it should be remitted to the state court for administration.—*Johnson v. Johnson* (Nev.), 225 Fed. 413, 418. In construing a will, a federal court is bound by the decisions of the highest court of the state when directed to similar testamentary provisions in cases before them for adjudication.—*Lucas v. McNeill* (Kan.), 231 Fed. 672, 674, 145 C. C. A. 558. It is within the power of the state to determine and to fix the order in which the debts of an estate shall be paid, and the order so fixed is binding on the federal court in a suit by a divorced wife for her portion of the community property.—*Johnson v. Garner* (Nev.), 233 Fed. 756, 767. Indispensable parties are such as are so necessary

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that a decree without their presence would prejudice their rights and leave the case in a shape contrary to equity and good conscience; in such a case the court refuses to entertain the suit where these parties can not be subjected to its jurisdiction.—*Grigsby v. Miller* (Or.), 231 Fed. 521, 523. Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default, he can not indefinitely and unnecessarily extend the bar of the statute of limitations by deferring such demand, but must make it within a reasonable time.—*Sullivan v. Ellis* (Colo.), 219 Fed. 694, 697, 135 C. C. A. 366.

#### REFERENCES.

Jurisdiction of probate court to administer testamentary trust.—21 Ann. Cas. 255. Enforcement of agreements in equity.—See note on Trusts, post.

17. Attack on jurisdiction.—The jurisdiction of any court exercising authority over any subject may be inquired into in every other court where the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceeding.—In re Moore's Guardianship, *Roberts v. Whiteman*, 51 Okla. 731, 152 Pac. 378. The record of a probate court affirmatively shows a want of jurisdiction, where it appears therefrom that, in proceedings for the final distribution of an estate, only twenty-one days elapsed between the date of the order to show cause, provided for by the statute, and the time fixed for the hearing, and that less than three weeks elapsed between the first publication of the order and the time fixed for the hearing.—*Teynor v. Heible*, 74 Wash. 222, 229, 46 L. R. A. (N. S.) 1033, 133 Pac. 1. Where, assailing the record of a county court, the plaintiff introduced parol evidence aliunde, over objection, the court did right in directing a verdict for the defendant, to lay that evidence out of the case, and, in effect, hold that it was incompetent and without probative force to impeach the validity of the record.—*Hathaway v. Hoffman*, 53 Okla. 72, 153 Pac. 184, 185. A guardianship proceeding is one which is continuing in its nature, and when the jurisdiction legally vested in any court is exercised, and such court brings under such jurisdiction and into its control the proper parties, such parties remain subject to such control and to the court's direction until the guardianship ends, and there is no power in any other court to supervise or interfere with the proper exercise of such jurisdiction, except upon appeal properly taken.—*State (ex rel.) v. Kelley*, 32 S. D. 526, 143 N. W. 953.

18. Vacating orders and judgments.—In a suit to set aside a judgment for fraud because procured by perjury, the facts upon which the claim of fraud and perjury is based must be stated; conclusions and epithets are not sufficient.—*Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811, 815. Where it is sought to vacate an order of sale of a decedent's real property, made by a county court, it must be held

that the court acquired jurisdiction of the matter involved by the publication of a citation to part of the petitioners, who obtained the order of sale, and by personal service as to the others.—*In re Marks' Estate*, 81 Or. 632, 639, 160 Pac. 540, 542.

19. Same. Jurisdiction in equity.—It is only where the prevailing party by some extrinsic or collateral fraud in addition to the perjury alleged, has prevented a fair trial, that equity will set aside a judgment for fraud.—*Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811, 815. It is not fraud for a party to an action to quiet title and for partition, to fail to disclose to his adversary evidence of the existence of a filed and unprobated will, although such disclosure would defeat his own claim and sustain that of his adversary; and allegations in a suit to set aside a judgment in such action do not sufficiently allege fraud which declare no affirmative act of defendants to prevent the discovery of such will.—*Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811, 814. A judgment or decree of a court of competent jurisdiction can be set aside for fraud only when the fraud alleged is shown to be extrinsic, or collateral to the matter which was tried and determined by such court.—*Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623. Equity has jurisdiction to vacate and set aside judgments and orders of the county court in probate cases, when such judgments and orders were obtained by fraud. A suit brought to set aside an order of the county court approving the final settlement of an administrator is a "direct" and not a "collateral" attack upon such order, although other relief was also sought.—*Johnson v. Filtsch*, 37 Okla. 510, 138 Pac. 165. A court of equity has jurisdiction, in a proper cause, to set aside a final decree of distribution entered through the fraudulent procurement of the administrator, provided such action is commenced within three years after the discovery of the fraud.—*Fischer v. Dolwig*, 29 N. D. 561, 151 N. W. 431, 166 N. W. 793.

## PART IV.

### EXECUTORS AND ADMINISTRATORS.

#### CHAPTER I.

##### LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED. HOW AND TO WHOM ISSUED.

- § 217. Corporations as executors.
- § 218. Letters on proved will must issue to whom.
- § 219. Form. Affidavit of no knowledge of subsequent will.
- § 220. Who are incompetent as executors.
- § 221. Form. Petition for letters of administration with the will annexed.
- § 222. Form. Order admitting will to probate, and for letters of administration with the will annexed.
- § 223. When no executor is named in will.
- § 224. Interested parties may file objections.
- § 225. Form. Objection to issuance of letters testamentary.
- § 226. Married woman may be executrix.
- § 227. Executor of an executor.
- § 228. Form. Petition for letters, etc., upon estate de bonis non.
- § 229. Form. Order appointing administrator (de bonis non).
- § 230. Letters where person is absent from state, or a minor.
- § 231. Acts of a portion of executors are valid when.
- § 232. Authority of administrators with will annexed. Letters, how issued.

##### LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE WILL ANNEXED.

- |   |  |
|---|--|
| 1. Letters testamentary. <ul style="list-style-type: none"><li>(1) In general.</li><li>(2) Application by foreign executor.</li></ul> | (2) Eligibility and qualification. <ul style="list-style-type: none"><li>(3) Where executors appointed can not or will not act.</li><li>(4) Right to nominate. Non-residents. Preference.</li><li>(5) Right to letters. Foreign wills.</li><li>(6) To be issued when. Order of appointment.</li><li>(7) Who are not entitled to.</li></ul> |
| 2. Jurisdiction of courts.  |  |
| 3. Appointment of executor by court.  |  |
| 4. Objections to appointment.   |  |
| 5. Failure to apply or to qualify. Effect of.   |  |
| 6. Letters of administration with will annexed. <ul style="list-style-type: none"><li>(1) In general.</li></ul>                       | 7. Validity and effect of appointment.   |
|   | 8. Appeal.   |

**§ 217. Corporations as executors.**

Corporations authorized by their articles of incorporation to act as executor, administrator, guardian of estates, assignee, receiver, depository, or trustee, and having a paid-up capital of not less than two hundred and fifty thousand dollars, of which one hundred thousand dollars shall have been actually paid in in cash, may be appointed to act in such capacity in like manner as individuals. In all cases in which it is required that an executor, administrator, guardian, assignee, receiver, depository, or trustee, shall qualify by taking and subscribing an oath, or in which an affidavit is required, it shall be a sufficient qualification by such corporation, if such oath shall be taken and subscribed, or such affidavit made, by the president or secretary or manager thereof; and such officer shall be liable for the failure of such corporation to perform any of the duties required by law to be performed by individuals acting in like capacity and subject to like penalties; and such corporation shall be liable for such failure to the full amount of its capital stock and upon the bond required upon its assuming the trusts provided for herein.—*Kerr's Cyc. Code Civ. Proc.*, § 1348.

**Note.**—Before a corporation can engage in the business of acting as executor, or administrator, it must file the affidavit and certificate of approval of the superintendent of banks, required by the Civil Code, § 290a, as amended in 1913 and 1917. See Laws of 1917, chapter 502, page 621.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

**Arizona**—Revised Statutes of 1913, paragraphs 781-783.

**Hawaii**—Revised Laws of 1915, section 3365.

**Washington**—Laws of 1917, chapter 156, page 663, section 87.

**Wyoming**—Compiled Statutes of 1910, section 4238; Laws of 1913, page 39; Laws of 1915, chapter 93, page 104.

**§ 218. Letters on proved will must issue to whom.**

If no objection is made as provided in section one thousand three hundred and fifty-one, the court admitting

a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, unless they or either of them have renounced their right to letters.—*Kerr's Cyc. Code Civ. Proc.*, § 1349.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1605.

Arizona—Revised Statutes of 1913, paragraph 773.

Colorado—Laws of 1915, chapter 173, page 490; amending Mills's Statutes of 1912, section 7902.

Idaho—Compiled Statutes of 1919, section 7476.

Kansas—General Statutes of 1915, sections 4486, 11,783.

Montana—Revised Codes of 1907, section 7421.

Nevada—Revised Laws of 1912, section 5883.

New Mexico—Statutes of 1915, section 2219.

North Dakota—Compiled Laws of 1913, section 8651.

Oklahoma—Revised Laws of 1910, section 6233.

Oregon—Lord's Oregon Laws, section 1142.

South Dakota—Compiled Laws of 1913, section 5694.

Utah—Compiled Laws of 1907, section 3798.

Washington—Laws of 1917, chapter 156, page 654, section 47.

Wyoming—Compiled Statutes of 1910, section 5494.

#### § 219. Form. Affidavit of no knowledge of subsequent will.

[Title of court.]

[Title of proceeding.]

{ No. —.1 Dept. No. —.  
[Title of form.]

State of —, }  
County of —, } ss.

—, being duly sworn, deposes and says: That, on or about the — day of —, 19—, he was, by order of this court, duly appointed administrator with the will annexed of the estate of —,<sup>2</sup> deceased; which will was dated the — day of —, 19—, and was duly admitted to probate herein on or about the — day of —, 19—; that affiant knows of no other and subsequent will of said deceased than said will above named.

Subscribed and sworn to before me this — day of —, 19—.

**Explanatory notes.**—1 Give file number. 2 Or, executor of the last will and testament of —, deceased. This affidavit is required by the statute of Washington: See *Pierce's Washington Code*, § 2428.

**§ 220. Who are incompetent as executors.**

No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority;
2. Convicted of an infamous crime;
3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.—*Kerr's Cyc. Code Civ. Proc.*, § 1350.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

**Alaska**—Compiled Laws of 1913, section 1605.  
**Arizona**—Revised Statutes of 1913, paragraph 774.  
**Colorado**—Mills's Statutes of 1912, section 7902.  
**Idaho**—Compiled Statutes of 1919, section 7477.  
**Kansas**—General Statutes of 1915, sections 4492, 4512.  
**Montana**—Revised Codes of 1907, section 7422.  
**Nevada**—Revised Laws of 1912, section 5884.  
**New Mexico**—Statutes of 1915, section 2223.  
**North Dakota**—Compiled Laws of 1913, sections 8651, 8682.  
**Oklahoma\***—Revised Laws of 1910, section 6234.  
**Oregon**—Lord's Oregon Laws, section 1173.  
**South Dakota**—Compiled Laws of 1913, section 5695.  
**Utah**—Compiled Laws of 1907, section 3799.  
**Washington**—Laws of 1917, chapter 156, page 663, section 87.  
**Wyoming**—Compiled Statutes of 1910, section 5495.

**§ 221. Form. Petition for letters of administration with the will annexed.**

[Title of court.]

[Title of estate.]

{ No. —. Dept. No. —.  
 [Title of form.]

To the Honorable the —<sup>1</sup> Court of the County<sup>2</sup> of —, State of —.

The petition of —, of said county,<sup>3</sup> respectfully shows:

That — died on or about the — day of —, 19—, in the county<sup>4</sup> of —, state of —;

That said deceased, at the time of his death, was a resident of the county <sup>5</sup> of —, state of —;

That said deceased left estate in the county <sup>6</sup> of —, state of —, consisting of —<sup>7</sup> property;

That the value, character, and annual revenue of said property are as follows, to wit: —;<sup>8</sup>

That the estate and effects for or in respect to which letters of administration are hereby applied for do not exceed the value of — dollars (\$—);<sup>9</sup>

That said decedent left a last will and testament, which is herewith presented to this court for probate;

That the names, ages, and residences of the next of kin of said deceased, and whom your petitioner is advised and believes, and therefore alleges, to be the heirs at law of said deceased, are as follows, namely:

Names.	Ages.	Residences.
—	—	—
—	—	—

That the names, ages, and residences of said testator's devisees and legatees, so far as known to your petitioner, are as follows, namely:

Names.	Ages.	Residences.
—	—	—
—	—	—

That your petitioner is the widow <sup>10</sup> of said —, deceased, and is interested in his estate;

That — is the person named in said will as the executor thereof, but has failed to apply for letters testamentary.<sup>11</sup>

Wherefore your petitioner prays that a day of court may be appointed for hearing this application; that the clerk of this court be directed to give due notice thereof by posting notices according to law; and that, upon said hearing and upon the proofs to be adduced, letters of ad-

ministration with the will annexed, upon said estate, be issued to your petitioner.

Dated —, 19—.

—, Petitioner.

—, Attorney for Petitioner.

**Explanatory notes.**—1 Title of court. 2-6 Or, city and county. 7 Real or personal, or real and personal. 8 Give separate description of real and personal property, stating what is the separate property of decedent, or what is the community property of decedent and of his widow. 9 Whether estate exceeds certain amount governs the time expressed in the notice to creditors. 10 Or, legatee or devisee, or other person interested in said estate. 11 Or, is incompetent, or renounces his right to letters testamentary; or, as the case may be, that no one is named in said will as the executor thereof.

**§ 222. Form. Order admitting will to probate, and for letters of administration with the will annexed.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the time for hearing the petition for the probate of the will, and for letters of administration with the will annexed, filed herein on the — day of —, 19—, was by the clerk duly set for the — day of —, 19—, and that notice of said hearing has been duly given as required by law;<sup>2</sup> and no person appearing to contest said petition, the court proceeds to hear the evidence, and thereupon finds that the allegations of said petition are true, and that said petition ought to be granted.

It is therefore ordered and adjudged by the court, That said — died on or about the — day of —, 19—, leaving estate in the state of —; that he was then a resident of the county <sup>3</sup> of —, in said state; that the instrument in writing hereinbefore filed, purporting to be his last will, and so alleged to be in said petition, be admitted to probate as the last will of said deceased; that said petitioner, —, be appointed administrator with the will annexed of the estate of said deceased; and that



letters of administration with the will annexed issue to him upon his taking the oath required by law and giving bond in the sum of — dollars (\$—).

Entered —, 19—. —, County Clerk.<sup>4</sup>  
By —, Deputy Clerk.

Explanatory notes.— 1 Give file number. 2 If matter has been continued, say, "and the hearing having been regularly continued by the court to this time." 3 Or, city and county. 4 See note, § 77, ante. In case the will has been previously admitted to probate, and only the appointment of an administrator with the will annexed is sought to fill a vacancy in administration, the portions of this order relating to probate can be eliminated.

**§ 223. When no executor is named in will.**

If no executor is named in the will, or if the sole executor or all the executors therein named are dead, or incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued as designated and provided for in granting of letters in case of intestacy.—*Kerr's Cyc. Code Civ. Proc.*, § 1350a.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Colorado—Laws of 1915, chapter 173, page 490; amending Mills's Statutes of 1912, section 7902.

South Dakota—Compiled Laws of 1913, section 5695.

Wyoming—Compiled Statutes of 1910, section 5495.

**§ 224. Interested parties may file objections.**

Any person interested in the estate or will may file objections in writing to granting letters testamentary to the persons named as executors or any of them, and the objections must be heard and determined by the court; a petition may, at the same time, be filed for letters of administration with the will annexed.—*Kerr's Cyc. Code Civ. Proc.*, § 1351.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1611.

Arizona\*—Revised Statutes of 1913, paragraph 775.

Idaho—Compiled Statutes of 1919, section 7478.  
 Montana—Revised Codes of 1907, section 7423.  
 Nevada—Revised Laws of 1912, section 5885.  
 North Dakota—Compiled Laws of 1913, section 8651.  
 Oklahoma—Revised Laws of 1910, section 6236.  
 South Dakota—Compiled Laws of 1913, section 5696.  
 Utah—Compiled Laws of 1907, section 3800.  
 Washington—Laws of 1917, chapter 156, page 654, section 48.  
 Wyoming—Compiled Statutes of 1910, section 5496.

**§ 225. Form. Objections to issuance of letters testamentary.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
 [Title of form.]

The undersigned, —, widow <sup>2</sup> of said deceased, now comes and objects to this court granting letters testamentary to —, the person named as executor in the last will and testament of said —, deceased, on the following grounds, namely:

That said — is under the age of majority;

That said — was, on the — day of —, 19—, in the — court of the county of —, state of —, convicted of the crime of —;<sup>3</sup>

That said — is an idle and dissolute person; that he uses intoxicating liquors so immoderately that he is frequently in a condition of drunkenness; and that he wants integrity and lacks understanding.

Contestant therefore asks that the issuance of letters testamentary to the said — be refused.

—, Attorney for Contestant. —, Contestant.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, legatee named in the will of said deceased; or other person interested in the estate. <sup>3</sup> State name of infamous crime. Concerning objections, see also § 258, post.

**§ 226. Married woman may be executrix.**

A married woman may be appointed an executrix. The authority of an executrix, who was unmarried when appointed, is not extinguished nor affected by her marriage.—*Kerr's Cyc. Code Civ. Proc.*, § 1352.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 776.

Hawaii—Revised Laws of 1915, section 2953.

Idaho—Compiled Statutes of 1919, section 7479.

Montana—Revised Codes of 1907, section 7424.

Nevada—Revised Laws of 1912, section 5886.

North Dakota—Compiled Laws of 1913, sections 8651, 8682.

South Dakota—Compiled Laws of 1913, section 5697.

Utah—Compiled Laws of 1907, section 3801.

Wyoming—Compiled Statutes of 1910, section 5497.

## § 227. Executor of an executor.

No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.—*Kerr's Cyc. Code Civ. Proc.*, § 1353.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 777.

Colorado—Mills's Statutes of 1912, section 7938.

Idaho\*—Compiled Statutes of 1919, section 7480.

Kansas—General Statutes of 1915, section 4494.

Montana\*—Revised Codes of 1907, section 7425.

Nevada—Revised Laws of 1912, section 5887.

North Dakota—Compiled Laws of 1913, section 8651.

Oklahoma\*—Revised Laws of 1910, section 6237.

South Dakota\*—Compiled Laws of 1913, section 5698.

Utah\*—Compiled Laws of 1907, section 3802.

Washington\*—Laws of 1917, chapter 156, page 655, section 53.

Wyoming\*—Compiled Statutes of 1910, section 5498.

## § 228. Form. Petition for letters, etc., upon estate de bonis non.

[Title of court.]

[Title of estate.]

{	No. —.1	Dept. No. —.
	[Title of form.]	

To the Honorable the — Court of the County<sup>2</sup> of  
—, State of —.

Your petitioner respectfully represents that he is a  
resident of the county<sup>4</sup> of —, state of —;

That on or about the — day of —, 19—, — died

in the county <sup>5</sup> of —, state of —, leaving a will; and that said will has been admitted to probate in this court;

That — is the person appointed in said will as the executor thereof; that letters testamentary thereunder have issued to the said —; that he has duly qualified as such executor, but has since resigned,<sup>6</sup> leaving a part of said estate unadministered; and that it is necessary that an administrator of said estate be appointed with said will annexed;

That the said — left real property of said estate unadministered, of the value of — dollars (\$—);

That the said — left personal property of said estate unadministered, of the value of — dollars (\$—).

Wherefore your petitioner prays that letters of administration upon said estate, with the will annexed, issue to him as provided by law. —, Petitioner.

—, Attorney for Petitioner.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Title of court. <sup>3-5</sup> Or, city and county. <sup>6</sup> Or, died, as the case may be.

**§ 229. Form. Order appointing administrator (de bonis non).**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the petition for letters of administration (de bonis non) herein was filed on —, 19—; that on the same day the time for hearing the same was by the clerk duly set for the — day of —, 19—; and that notice of said hearing has been duly given as required by law and by the order of this court; and the matter now coming regularly on for hearing <sup>2</sup> and no person appearing to contest said petition, the court proceeds to hear the evidence, and thereupon finds that the facts therein alleged are true, and that said petition ought to be granted.

It is therefore ordered and adjudged by the court, That

— be appointed administrator <sup>2</sup> of all of the estate of said —, deceased, not heretofore administered, and that letters of administration thereon issue to him upon his taking the oath as required by law and giving bond in the sum of — dollars (\$—).

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, if the matter has been continued, say, "and the hearing having been regularly postponed by the court to this day." <sup>3</sup> Or, administratrix, according to the fact.

**§ 230. Letters where person is absent from state, or a minor.**

Where a person absent from the state, or a minor is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration, with the will annexed, must be granted; but the court may, in its discretion, revoke them on the return of the absent executor or the arrival of the minor at the age of majority.—*Kerr's Cyc. Code Civ. Proc.*, § 1354.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 778.

Idaho\*—Compiled Statutes of 1919, section 7481.

Kansas—General Statutes of 1915, section 4492.

Montana\*—Revised Codes of 1907, section 7426.

Nevada—Revised Laws of 1912, section 5889.

North Dakota—Compiled Laws of 1913, section 8651.

Oklahoma\*—Revised Laws of 1910, section 6238.

Oregon—Lord's Oregon Laws, section 1155.

South Dakota\*—Compiled Laws of 1913, section 5699.

Utah—Compiled Laws of 1907, section 3803.

Washington—Laws of 1917, chapter 156, page 654, sections 50, 87.

Wyoming\*—Compiled Statutes of 1910, section 5499.

**§ 231. Acts of a portion of executors are valid when.**

When all the executors named are not appointed by the court, those appointed have the same authority to per-

form all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority, in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid.—*Kerr's Cyc. Code Civ. Proc.*, § 1355.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 779.
- Colorado—Mills's Statutes of 1912, section 7965.
- Idaho\*—Compiled Statutes of 1919, section 7482.
- Montana\*—Revised Codes of 1907, section 7427.
- Nevada—Revised Laws of 1912, section 5889.
- North Dakota—Compiled Laws of 1913, section 8651.
- Oklahoma\*—Revised Laws of 1910, section 6239.
- South Dakota\*—Compiled Laws of 1913, section 5700.
- Utah\*—Compiled Laws of 1907, section 3910.
- Wyoming\*—Compiled Statutes of 1910, section 5500.

#### § 232. Authority of administrators with will annexed. Letters, how issued.

Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court, and bear the seal thereof.—*Kerr's Cyc. Code Civ. Proc.*, § 1356.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 780.
- Colorado—Mills's Statutes of 1912, sections 7930, 7966.
- Idaho\*—Compiled Statutes of 1919, section 7483.
- Kansas—General Statutes of 1915, section 11,783.
- Montana\*—Revised Codes of 1907, section 7428.
- Nevada—Revised Laws of 1912, section 5890.
- Oklahoma—Revised Laws of 1910, section 6241.
- South Dakota\*—Compiled Laws of 1913, section 5701.

Utah—Compiled Laws of 1907, section 3911.

Washington—Laws of 1917, chapter 156, page 655, section 55.

Wyoming—Compiled Statutes of 1910, section 5501.

LETTERS TESTAMENTARY AND OF ADMINISTRATION WITH THE  
WILL ANNEXED.

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| (1) In general.                                 |  |

1. Letters testamentary.

(1) In general.—A man has the right to make such disposition of his property as he chooses, subject only to such limitations as are expressly required by law, and, within the same limitations, he has the absolute right to carry out the provisions of his will. In other words, the executor named in a will has the right to act, unless there is some express provision of law which declares that he has not. And, as a consequence, the testator may lawfully select any person for this trust who does not fall within one of the classes expressly mentioned and declared to be incompetent.—Estate of Bauquier, 88 Cal. 302, 308, 26 Pac. 178, 532. Letters testamentary issue only as the consequence of the probate of the will.—Estate of Warfield, 22 Cal. 51, 66, 83 Am. Dec. 49. The naming of an executor is ordinarily a part of a will, and, in the absence of any objection to his competency, an order admitting the will to probate includes his right to have letters testamentary issued to him.—Estate of Richardson, 120 Cal. 344, 346, 52 Pac. 832. While it is true that the appointment of an executor is only provisional, and requires the approval of the court, for the purpose of administration upon the estate of the testator, yet it is also true that the law allows a man to appoint his executors, subject to its approval, and treats them as entitled to the office until they renounce it; and unless, for some reason, they are incompetent, the appointment makes them representatives of the estate, "so far as relates to acts in which they are merely passive, such as receiving notice of the dishonor of a note." It matters not that the person named in the will may never be actually appointed executor by the court. He may renounce the trust.—Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773. A will appointing two daughters, M. and M. B., "to be the sole executors of this my will," and directing that if the testatrix should die before M. and M. B. shall be of full age the H. T. Co. should

"act as such executor and trustee until they the said Muriel Campbell and Mary Beatrice Campbell shall reach their majority and are qualified to act as such executrices and trustees" (the company and the daughters having been appointed trustees under the will), the elder daughter coming of age after the death of the testatrix and before the will is probated is entitled to letters testamentary with the H. T. Co. This construction presents less difficulty than any other, "their" majority being construed as meaning "as they respectively reach the age of majority," and "and" to mean "or."—Estate of Parker, 19 Haw. 393. Where the substantive right to administer the estate is absolute and the only substantial difference between letters testamentary and letters of administration with the will annexed is the matter of giving bonds, in a case where that matter is one within the court's discretion and the will expressly dispenses with an executor's bond, the court abuses its discretion by not granting the letters testamentary.—Estate of Randal, 177 Cal. 363, 170 Pac. 835.

## REFERENCES.

Who may be an executor or administrator.—See note 54 Am. Dec. 518-522.

(2) Application by foreign executor.—A foreign executor has the right to apply for letters testamentary in this state to himself, but he should be required to come here within a reasonable time, and submit himself to the jurisdiction of the court, and personally conduct the settlement of the estate. Where he does so, his non-residence does not disqualify him.—Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828, 832; Estate of Harrison, 135 Cal. 7, 66 Pac. 846; Estate of Brundage, 141 Cal. 538, 75 Pac. 175; In re Connors' Estate, 16 Mont. 465, 41 Pac. 271; Estate of Kelly, 122 Cal. 379, 55 Pac. 136; Heck v. Carey, 13 Wyo. 154, 110 Am. St. Rep. 981, 78 Pac. 705. It is not necessary that he be actually in the state when the order for the issuance of letters is made. His application may be made by himself in person or by attorney, and if made by attorney, he is constructively present. If required by the court, he must appear and testify when the penalty of his bond is fixed, and, at any rate, he must appear and qualify within a reasonable time. If he fails to make application for letters, or to appear and qualify within proper time, letters of administration with the will annexed will be issued to some other person. Where, however, he has made application for letters, either in person or by attorney, it is not absolutely necessary that he be actually in the state when the order is made directing the issuance of letters. If a bond is required, the court may delay for a time fixing the penalty of it, or may fix it by examining on oath other persons, and if the property requires immediate repair, a special administrator may be appointed.—Estate of Brown, 80 Cal. 381, 384, 22 Pac. 233. If he fails to petition for the probate of the will and for letters testamentary within the time prescribed by statute, he may be held to have renounced his right



to letters, and, unless good cause is shown for the delay, the court may appoint any competent person to act. The statute which provides that if the person named in the will as executor, for a specified time after he has knowledge of the death of the testator and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and authorizing the court to appoint any other competent person administrator unless good cause for delay is shown, applies to foreign wills as well as to domestic wills.—*Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828, 831. But, while a foreign executor has the right to apply for letters testamentary in this state to himself, he has no legal right to nominate an administrator with the will annexed.—*Estate of Harrison*, 135 Cal. 7, 8, 66 Pac. 846.

#### REFERENCES.

Foreign corporation as executor or administrator.—See note 24 L. R. A. 291. Right of non-resident to act as executor or administrator.—See notes 1 L. R. A. (N. S.) 341-348, 113 Am. St. Rep. 562-565.

2. Jurisdiction of courts.—Exclusive jurisdiction over the estate of a decedent, who is a resident of the state, is in the probate court of the county of which the deceased was resident at the time of his death; but, in view of the fact that a decedent may leave estate in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, the court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate. Jurisdiction of the proceedings for the settlement of the estate of a deceased person can not exist in two courts of the state at the same time. There can not be two valid administrations at the same time and in the same state; and when the probate court has acquired jurisdiction of the subject-matter, that jurisdiction is exclusive.—*Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767, 768; *Estate of Griffith*, 84 Cal. 107, 110 Pac. 528, 24 Pac. 381. A probate court has no power to appoint an administrator without conforming to the steps prescribed in cases of intestacy.—*Estate of Bouyssou*, 3 Cal. App. 39, 84 Pac. 460.

3. Appointment of executor by court.—A trust company appointed as executor of a will need not necessarily be appointed by the court, though named in the will, unless it amply secures those interested in the estate from loss.—*Estate of Kilborn*, 5 Cal. App. 161, 89 Pac. 985, 987. If the person named as executor in the will does not come within the inhibited class, the court has no right to refuse his application.—*Holladay v. Holladay*, 16 Or. 147, 19 Pac. 81, 83. While the court is authorized to refuse to appoint an executor named in a will, for want of integrity, yet his appointment will be refused by the court only upon clear and convincing evidence establishing such disqualifying fact.—*In re Bauquier*, 88 Cal. 302, 313, 26 Pac. 178, 532. Under section

1354 of the Code of Civil Procedure of California, which gives the court, "on the return of the absent executor," discretion to revoke ancillary letters of administration and to grant letters to such executor, the court may, after such revocation grant letters to a non-resident executor of the estate of a non-resident testator, on such executor's visiting that state for such purpose.—Estate of Randall, 177 Cal. 363, 170 Pac. 835. Mere immorality is not sufficient to justify a court's refusal to appoint as executor or executrix one who is duly nominated for such appointment by will.—Estate of Munroe, 161 Cal. 10, 118 Pac. 242, Ann. Cas. 1913B, 1161. Under the Hawaiian system of probate procedure as prescribed by statute, the appointment of different executors in that territory, each having distinct and separate powers and duties with respect to the property of an estate lying in that jurisdiction, is not permissible.—Estate of Luttet, 23 Haw. 11, 18.

4. Objections to appointment.—The only objections that can properly be made to the granting of letters testamentary to the executors named in the will, upon the grounds of incompetency, must be for one or more of the reasons stated in the statute; and if the persons named in the will do not come within either of the classes of persons mentioned in the statute, and declared thereby to be incompetent, they have the right to the appointment, unless they have renounced, or have failed to apply for the probate of a will, or for letters.—Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828, 830. The court may, under the statute, and upon objections, decline to appoint an executor, although named in the will; and if objections are made to the appointment of a trust company as co-executor, based upon facts tending to show that its financial condition and its securities on deposit are not such as to afford ample protection to the estate, it is within the power of the court, notwithstanding the certificate of the bank commissioners (which is not conclusive evidence of the fact of solvency), to inquire into the financial condition of the company, and if it should appear that the assets are insufficient as security for the faithful performance of his trust, to refuse the appointment. Those sections of the general law which give to the court authority to require additional security from an executor, when it is made to appear that the original undertaking is insufficient for any reason, apply to the equivalent of the bond given by a corporation; and even though a court may, in the first instance, appoint a corporation as executor without bond, yet, at any time during the administration of the trust, under these sections, it may require further and additional security, if satisfied that the interests of the estate demand it.—Estate of Kilborn, 5 Cal. App. 161, 89 Pac. 985, 987. Where an executrix named in the will appeared to have no interest in the estate under the will or otherwise, and the estate appeared to be insufficient to pay its debts, including the allowance to the insane widow, and where it further appeared that the appointment of the executrix named might endanger the estate, or lead to embarrassment in the administration thereof, it

was held that the court should have sustained a protest against the executrix named, under the provisions of section 7111, Revised Statutes of Colorado.—*Deeble v. Alerton*, 58 Colo. 166, 172, 143 Pac. 1096, Ann. Cas. 1916C, 863.

5. Failure to apply or to qualify. Effect of.—The object of the statute, both with respect to the issuance of letters testamentary and as to the issuance of letters of administration, is the same, namely, to secure the prompt settlement of an estate. The preference in the one case is given by reason of the express wish of the testator, and in the other by reason of relation of interest in the estate; and neither should be disregarded, providing the person so designated, either by the testator or the statute, proceeds with diligence to discharge the duties of the trust; but, upon his failure to do so, the right of preference is lost, and the others interested in the estate have the right to come in.—*Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828, 832. It does not follow, however, that a widow who fails to apply for letters on her husband's estate within the time prescribed by statute can not afterwards be appointed administratrix.—*Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456. An executor derives his authority from the will; and confirmation by the court, followed by the filing of a bond, is equivalent to taking out letters, the letters being but the authentic evidence of the power conferred by the will.—*Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482, 484. Under the probate law of California, no such officer as an executor *de son tort* is recognized. Hence if a person is named in the will as a co-executor, but refuses or neglects to qualify, and a sale is afterwards made to him by the executrix of certain property belonging to the estate, the fact that he was named in the will as executor, and actually applied for letters, would not constitute him a trustee for the estate at the time the contract of sale was made.—*Bowden v. Pierce*, 73 Cal. 459, 463, 14 Pac. 302, 15 Pac. 64.

#### 6. Letters of administration with will annexed.

(1) In general.—The appointment of an administrator with the will annexed is to be made in the manner provided for the granting of letters of administration in cases of intestacy. If the court denies probate to the will, it is not authorized to appoint an administrator with the will annexed.—*Estate of Bouyssou*, 1 Cal. App. 657, 658, 82 Pac. 1066. The naming of an executor is not essential to the validity of a will; and a decedent whose will is entitled to be admitted to probate does not die intestate. In such a case the granting of letters of administration with the will annexed is not limited to the order prescribed by statute in cases where a party dies intestate.—*Estate of Barton*, 52 Cal. 538, 540. The testator is presumed to have understood that, in the case of the death of the party named as executor, without any other provision in the will supplying its place, the probate court would be authorized to appoint an administrator with the will annexed, who would be thereby invested with all the powers of the executor

named in the will, subject only to such special supervision and limitations as are imposed by the statute itself. The effect is the same as if the testator had incorporated these provisions in express terms into the will.—*Kidwell v. Brummigan*, 32 Cal. 436, 441. An adverse claim made by a person does not render him incompetent to act as an administrator with the will annexed. His bond as administrator with the will annexed affords ample protection to devisees, legatees, and others interested in the estate.—*Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828, 832. Section 1350a, of the Code of Civil Procedure of California, relating to cases where a will names no executor, and section 1377 of that code, whereby letters of administration may be granted to any applicant when no one entitled to them applies, considered in respect to one who, without applying, although entitled to do so, contested the granting of letters to an applicant.—*Estate of Davis*, 175 Cal. 198, 165 Pac. 525, 527.

(2) *Eligibility and qualification.*—An applicant for letters of administration with the will annexed is not, by reason of being 92 years old, ineligible for appointment, if a man of physical activity, notwithstanding his years, clearness of memory and perception, and accustomed to managing his own business affairs, besides being familiar with the affairs of the decedent, his sister.—*Estate of Wright*, 177 Cal. 274, 170 Pac. 610, 612. One petitioning for appointment as administrator with the will annexed is not disqualified by reason of having a prejudice against some of the heirs or devisees.—*Estate of Wright*, 177 Cal. 274, 170 Pac. 610, 612. When a court has appointed a very aged man administrator with the will annexed, and before doing so has had the man before it and heard him examined and cross-examined as to his physical and mental capability to perform the functions of the office, it is immaterial that the man may have stated that he was too old to undertake the duties.—*Estate of Wright*, 177 Cal. 274, 170 Pac. 610, 612.

(3) *Where executors appointed can not or will not act.*—If executors have been appointed by the decedent, and can not act, nor will not act, or are not allowed to act, then the same persons in the same order, are entitled to letters of administration with the will annexed. Where the choice of the decedent fails, the law will enforce its choice.—*Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828, 832; *Estate of Garber*, 74 Cal. 338, 340, 16 Pac. 233; *Estate of Li Po Tai*, 108 Cal. 484, 488, 41 Pac. 486, 39 Pac. 30; *Estate of Richardson*, 120 Cal. 344, 346, 52 Pac. 832. And the same is true of cases where the executor dies before the will has been probated or letters have been issued.—*Estate of McDonald*, 118 Cal. 277, 279, 50 Pac. 399. Where a person nominated in a will as executrix is found to be incompetent, letters of administration with the will annexed should issue as in cases of intestacy.—*Estate of Munroe*, 161 Cal. 10, 118 Pac. 242, *Ann. Cas.* 1913B, 1161.

(4) **Right to nominate. Non-residents. Preference.**—While the statute authorizes the issuance of letters testamentary to a non-resident executor, it does not entitle him to letters of administration, or give him the right to nominate an administrator with the will annexed.—Estate of Brundage, 141 Cal. 538, 541, 75 Pac. 175; and if he make no application for letters testamentary, a resident son of the decedent is entitled to letters as against the nominee of such executor, and the court has no discretion in the matter.—Estate of Brundage, 141 Cal. 538, 541, 75 Pac. 175; but where the executor joins in the petition of his nominee, upon the filing of an authenticated copy of the will, and requests his appointment, the court does have a discretionary power to appoint him, and is not legally bound to appoint the public administrator.—Estate of Harrison, 135 Cal. 7, 8, 66 Pac. 846. So if the executor fails to apply for letters testamentary, but requests the appointment of a nominee, the appointment is placed in the discretion of the court, and it may appoint the public administrator instead of the nominee.—Estate of Richardson, 120 Cal. 344, 346, 52 Pac. 852. If an executrix fails for four years to apply for letters testamentary, and dies before making application therefor, the public administrator is entitled to letters, in preference to a sister of the deceased executrix.—Estate of McDonald, 118 Cal. 277, 280, 50 Pac. 399. Where an application for appointment as executor was denied under a law which declared that an executor who was absent from or resided out of the state was incompetent, but this disqualification was omitted in a subsequent statute, which took effect after the application was denied, and the matter is pending on appeal at the time of such statutory change, the case may be remanded, with directions to dismiss the application for the appointment as executor without prejudice to the making of a new application dependent upon the law as it exists.—In re Connors' Estate, 16 Mont. 465, 41 Pac. 271. Where the person named as executor in a will can not, for any reason, be appointed to take charge of the community estate, an administrator thereof should be appointed, to which appointment the surviving spouse, or the person he or she might nominate, would have preference.—Smith v. Ferry, 6 Wash. 285, sub nom.; In re Hill's estate, 33 Pac. 585, 587. A non-resident executor of a foreign will can not, as such, nominate a resident of this state, who is not otherwise "interested in the will," so as to entitle him to letters of administration with the will annexed as against the public administrator.—Estate of Meier, 165 Cal. 456, 132 Pac. 764, Ann. Cas. 1914D, 121, 48 L. R. A. (N. S.) 858. Persons falling under the fourth and fifth subdivisions of section 5351, Rev. Codes of Idaho, are not entitled to nominate a person falling under the eleventh subdivision of that section, and have that person advanced to the rank and class occupied by the person making the nomination.—Estate of Daggett, 15 Idaho 504, 508, 98 Pac. 849. It is only the persons designated in the statute, who are entitled to nominate some other person for appointment, and thereby have such person advanced to the rank and class

of the one making the request or nomination.—Estate of Daggett, 15 Idaho 504, 508, 98 Pac. 849. The application of a non-resident brother and other heirs of the deceased does not give the person recommended by them a preference right over any others entitled to the appointment as administrator under the statute.—Wright v. Merrill, 26 Idaho 8, 14, 140 Pac. 1101.

(5) **Right to letters. Foreign wills.**—The provisions of the statute relating to the probate of foreign wills are not to be construed independently of the other provisions of the statute relating to the right of administration, as between persons interested in the will. That section of the statute which provides that "letters of administration with the will annexed must be issued as designated and provided for the grant of letters in cases of intestacy," is not restricted to any class of wills, and certainly must include foreign wills in its provisions.—Estate of Coan, 132 Cal. 401, 403, 64 Pac. 691. On the probate of a foreign will in this state, in the absence of a petition by the executor named in the will, letters of administration must be granted to a person interested in the will, who applies for them.—Estate of Bergin, 100 Cal. 376, 34 Pac. 867. One who lives in this state, and is an assignee of part of the interest of a non-resident sole devisee and executor of the will, is entitled to letters, as being a person interested in the will.—Estate of Engle, 124 Cal. 292, 56 Pac. 1022. If no statutory objection can be made to the granting of letters testamentary to a person named as executor in a foreign will, he has the right to the appointment, unless he has renounced or failed to apply for the probate of the will and letters testamentary.—Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828, 830. If a foreign executor fails to make application for letters testamentary in this state, he has no power or right to nominate an administrator with the will annexed.—Estate of Brundage, 141 Cal. 538, 541, 75 Pac. 175. But in default of application for letters testamentary by the executor, or by a devisee resident in this state, who is entitled to act as administrator, there is no statutory provision which requires the court to appoint the nominee of such executor or of any resident devisee.—Estate of Richardson, 120 Cal. 344, 346, 52 Pac. 832. If, however, a foreign executor joins in the petition of his nominee, and requests the latter's appointment, the court has a discretionary power to appoint such nominee.—Estate of Harrison, 135 Cal. 7, 8, 66 Pac. 846. A court may appoint an administrator of the estate of a non-resident deceased, where the only assets of said estate consist of a right of action against a resident of this state, or in case there are no assets at all. If there should be nothing which the administrator could legally do, it could harm nobody. But if there should be something which the administrator ought to do, then the appointment would be necessary.—In re Tasanen's Estate, 25 Utah 396, 71 Pac. 984, 986. But, in Washington, where eleven years have elapsed after a testator's death, and his estate has been finally settled in another state by a

court of competent jurisdiction, and he left no personal estate in Washington, but did leave an equitable title to real estate, which however, had vested in the devisees, and their rights had become absolute under the statute, it was held that there was no necessity for any administration in Washington.—*Murphy v. Murphy*, 42 Wash. 142, 84 Pac. 646, 648. On the probate of a foreign will in this state, in the absence of a petition by the executor named in the will, letters of administration must be granted to a person interested in the will, who applies for them, and a petition of the public administrator for the issuance of letters of administration to himself should be denied.—*Estate of Bergin*, 100 Cal. 376, 378, 34 Pac. 867. In this case it was said that "whether or not the general provisions of the code about public administrators refer only to the estates of persons dying in their counties, and to domestic wills, must be considered an open question."—*Estate of Bergin*, 100 Cal. 376, 378, 34 Pac. 867. So if the devisee under a foreign will is interested in the will, within the meaning of the statute, so as to entitle him to letters of administration as against the public administrator, it follows that his assignee is likewise entitled to letters, in preference to the public administrator.—*Estate of Engle*, 124 Cal. 292, 293, 56 Pac. 1022. In the case of a foreign will, when the non-resident executor does not apply for letters in this state, any person "interested in the will," which term includes any devisee or legatee, or an assignee of a devisee or legatee, who is in all respects competent to serve as administrator under the laws of this state, is entitled as a matter of right to such letters in preference to any person "not interested in the will," by virtue of the provisions specially applicable to foreign wills.—*Estate of Meier*, 165 Cal. 456, 132 Pac. 764, Ann. Cas. 1914D, 121, 48 L. R. A. (N. S.) 858. In the case of a foreign will, when a non-resident executor does not apply for letters in this state, where there are applications for appointment by two or more persons "interested in the will" who are competent to serve as administrator under the laws of this state, the relative rights of the parties are determined by the rules applicable in cases of intestacy.—*Estate of Meier*, 165 Cal. 456, 132 Pac. 764, Ann. Cas. 1914D, 121, 48 L. R. A. (N. S.) 858. The general provisions relating to the issuance of letters of administration with the will annexed control in the case of foreign wills, except in so far as there is special provision to the contrary in the article on foreign wills.—*Estate of Meier*, 165 Cal. 456, 132 Pac. 764, Ann. Cas. 1914D, 121, 48 L. R. A. (N. S.) 858. In the case of a foreign will, any attempted nomination of another as administrator by one "interested in the will" who is himself incompetent to serve as administrator under the laws of this state, except where the nomination is made by the surviving husband or wife, is ineffectual for any purpose.—*Estate of Meier*, 165 Cal. 456, 132 Pac. 764, Ann. Cas. 1914D, 121, 48 L. R. A. (N. S.) 858. In the case of a foreign will, when the non-resident executor does not apply for letters in this state, where none of the applicants is "interested in

the will," the rule applicable in cases of intestacy control. Such rules require the appointment of the public administrator in preference to one whose only claim, apart from the fact that he is legally competent, is based on the nomination of the executor of the will or the nomination of some one interested in the will, other than the surviving husband or wife, who is himself incompetent to serve as administrator.—Estate of Meier, 165 Cal. 456, 132 Pac. 764, Ann. Cas. 1914D, 121, 48 L. R. A. (N. S.) 858. Sections 1322-1324 of the Code of Civil Procedure of California, dealing especially with foreign wills, prevail over all conflicting provisions as to all the matters arising out of that article of the code; and thereunder the executor in a foreign will is entitled to letters if he applies therefor, but in the absence of his application letters must be granted to "any other person interested in the will" who applies for them, provided the applicant has the qualifications prescribed by law for administrator.—Estate of Meier, 165 Cal. 456, 132 Pac. 764, Ann. Cas. 1914D, 121, 48 L. R. A. (N. S.) 858.

(6) To be issued when. Order of appointment.—If a decedent has left a will entitled to probate, he does not die intestate, within the meaning of the statute which prescribes the order in which the persons therein designated are entitled to an estate of a person dying intestate, and in such cases the granting of letters with the will annexed is not limited to the order prescribed in the statute.—Estate of Barton, 52 Cal. 538, 540; Estate of McDonald, 118 Cal. 277, 279, 50 Pac. 399. Hence where an executrix died four years after the death of decedent, without having applied for letters testamentary, the public administrator is entitled to letters of administration with the will annexed upon the estate, and the court has no discretion to refuse such letters to him, and to grant them to the sister of the deceased executrix, although she offers to waive the commissions to which she would be entitled in the interest of the estate.—Estate of McDonald, 118 Cal. 277, 280, 50 Pac. 399. Where the administration of an estate has become vacant by the revocation of the letters of administration with the will annexed, and the estate has not been fully administered, it is the duty of the court to appoint an administrator with the will annexed to complete the administration; and the court has no right to refuse to make such appointment on the ground that the heirs of the deceased have parted with their interest in the property of the estate.—Estate of Pina, 112 Cal. 14, 16, 44 Pac. 332; Estate of Strong, 119 Cal. 663, 667, 51 Pac. 1078. The statute which provides that "if the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or appear and qualify, letters of administration with the will annexed must be issued as designated and provided for the grant of letters as in cases of intestacy," refers only to cases where an executor has been named in the will.—Estate of Von Buncken, 120 Cal. 343, 52 Pac. 819. Where a will attempted to appoint two different executors with separate and distinct powers and duties with respect to the property of the testator, it was



proper to appoint an administrator with the will annexed.—Estate of Luttet, 23 Haw. 11, 18. After death of executor, discharged because he could find no property, court held authorized to appoint administratrix cum testamento annexo, to administer subsequently discovered property without first vacating order of discharge, under section 1698 of the Code of Civil Procedure of California, providing that final settlement shall not prevent subsequent letters where other property is discovered or if it should otherwise become necessary.—Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34.

(7) Who are not entitled to.—In the event that no executor is appointed in the will, the public administrator, as against a legatee, is not entitled to letters of administration with the will annexed.—Estate of Von Buncken, 120 Cal. 343, 52 Pac. 819. In the case of a partnership estate where there were unsettled matters between the partners, growing out of the partnership relation, at the time of the death of one of the partners, the surviving partner is not entitled to letters of administration with the will annexed.—Estate of Garber, 74 Cal. 338, 340, 16 Pac. 233. A relative of a deceased person who is not entitled on distribution to succeed to any portion of the estate is not entitled to letters of administration with the will annexed.—Estate of Winbigler, 166 Cal. 434, 137 Pac. 1. The assignee of the interests of non-resident legatees under a domestic will, claiming solely by virtue of the assignment, is not entitled to letters of administration with the will annexed, upon the estate, in preference to the public administrator; such assignee is a stranger to the estate, and his right to administer the estate, though the decedent died testate, is subordinate to that of the public administrator; the court therefore, in such a case, errs in refusing to appoint the public administrator.—In re Moran's Estate, Hynes v. Peake, 176 Cal. 216, 168 Pac. 18. Where a testator provides that if his estate is worth the sum of \$40,000 at the time of his death it shall be divided among certain designated relatives, and that a designated niece and nephew shall receive nothing, and then subsequently provides that if his estate shall be worth more than such sum "then all heirs shall receive the larger amount," such niece and nephew are not entitled to any portion of the estate in the event of the latter contingency, and are therefore not entitled to letters of administration with the will annexed as against a named legatee.—Estate of Winbigler, 166 Cal. 434, 137 Pac. 1. A relative of a deceased person, who is not entitled on distribution to succeed to any portion of the estate, is not entitled to letters of administration with the will annexed.—Estate of Winbigler, 166 Cal. 434, 137 Pac. 1. The assignee of portions of an estate from the sole beneficiary under the will of the deceased, presenting a copy of the foreign will and the probate thereof, duly authenticated, according to section 1323 of the Code of Civil Procedure of California, is entitled, if competent to serve as administrator in this state, to letters of administration with the will annexed, as against one who, like the public administrator, is not "interested in the estate."

—In *re Rankin's Estate*, 164 Cal. 138, 127 Pac. 1034. It is immaterial, so far as the public administrator is concerned, that nothing of value was paid by the assignee of portions of the estate of a deceased person.  
—In *re Rankin's Estate*, 164 Cal. 138, 127 Pac. 1034.

7. *Validity and effect of appointment.*—Letters testamentary issued to one person are unauthorized and void where the order of the court directed the letters to be issued to another person.—*Estate of Frey*, 52 Cal. 658, 661. After letters testamentary have been issued, the court has no power afterwards to appoint a special administrator of the estate, unless the executor or executrix is first suspended or removed.—*Schroeder v. Superior Court*, 70 Cal. 343, 11 Pac. 651. But the appointment of an administrator with the will annexed supersedes, per se, all former administrations of the estate.—*McCanley v. Harvey*, 49 Cal. 497, 505. Where the hearing of a petition for letters of administration with the will annexed has been fixed for the fifteenth day of a month named, the issue and posting, on the fifth day of that month, of the notice of hearing complies with the statute, section 1373 of the Code of Civil Procedure of California.—*Estate of Wright*, 177 Cal. 274, 170 Pac. 610.

8. *Appeal.*—Where a will has been refused probate in the lower court, but the appellate court directs the will to be admitted to probate, the lower court will not be directed to issue letters of administration with the will annexed to the petitioner, unless it has been found as a fact by the probate court that he is a proper person to receive such letters. That matter must be left open for further consideration of the court below.—*Estate of Wood*, 36 Cal. 75, 82. If the executor named in the will fails to apply for letters testamentary, the exercise of the court's discretion in appointing some other person administrator with the will annexed will not be disturbed, where no abuse of discretion is shown.—*Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828, 832. In a controversy between two persons to be appointed executors of an estate, the judgment of the supreme court settling the matter should be carried into effect by the probate court, notwithstanding the death of one of the persons before the last-named court acts on the matter.—*Estate of Pacheco*, 29 Cal. 224.

## CHAPTER II.

## FORM OF LETTERS.

- § 233. Form of letters testamentary.
- § 234. Form. Oath of executor or executrix.
- § 235. Form. Clerk's certificate that letters testamentary have been recorded.
- § 236. Form of letters of administration with the will annexed.
- § 237. Form. Oath of administration with the will annexed.
- § 238. Form. Clerk's certificate that letters of administration with the will annexed have been recorded.
- § 239. Form of letters of administration.
- § 240. Form. Oath of administrator or administratrix.
- § 241. Form. Clerk's certificate that letters of administration have been recorded.

## § 233. Form of letters testamentary.

Letters testamentary must be substantially in the following form: State of California, county, or city and county of —. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the superior court of the county, or city and county of —, C. D., who is named therein as such, is hereby appointed executor. Witness, G. H., clerk of the superior court of the county, or city and county of —, with the seal of the court affixed the — day of —, A. D., 18—. (Seal.) By order of the court. G. H., Clerk.—*Kerr's Cyc. Code Civ. Proc.*, § 1360.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1630.
- Arizona—Revised Statutes of 1913, paragraph 784.
- Colorado—Mills's Statutes of 1912, section 7930.
- Idaho\*—Compiled Statutes of 1919, section 7484.
- Montana\*—Revised Codes of 1907, section 7429.
- New Mexico—Statutes of 1915, section 2216.
- North Dakota—Compiled Laws of 1913, section 8689.
- Oklahoma—Revised Laws of 1910, section 6242.
- Oregon—Lord's Oregon Laws, section 1174.

South Dakota\*—Compiled Laws of 1913, section 5702.

Utah\*—Compiled Laws of 1907, section 3804.

Wyoming—Compiled Statutes of 1910, section 5524.

**§ 234. Form. Oath of executor or executrix.**

[Title of court.]

[Title of estate.]

{ No. —. Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>1</sup> of —, } ss.

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of —, and that I will faithfully discharge the duties of executor <sup>2</sup> of the last will of —, deceased, according to law.

Subscribed and sworn to before me this — day of —, 19—.

—, Deputy County Clerk of the County <sup>3</sup> of —.

Explanatory notes.—<sup>1</sup> Or, City and County. <sup>2</sup> Or, executrix. <sup>3</sup> Or, City and County. The oath is to be attached to the letters, and the letters must be recorded: See § 275, post.

**§ 235. Form. Clerk's certificate that letters testamentary have been recorded.**

[Title of court.]

[Title of estate.]

{ No. —.<sup>1</sup> Dept. No. —.  
[Title of form.]

Office of the County Clerk.

County <sup>2</sup> of —, } ss.

I, —, county clerk of the county <sup>3</sup> of —, and ex officio clerk of the — <sup>4</sup> court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the letters testamentary in the matter of the estate of —, deceased, now on file and of record in my office; and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

Witness my hand and the seal of said court this — day of —, 19—.

[Seal] ,

—, Clerk.

By —, Deputy Clerk.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup>, <sup>3</sup> Or, City and County.  
<sup>4</sup> Title of court.

**§ 236. Form of letters of administration with the will annexed.**

Letters of administration, with the will annexed, must be substantially in the following form: State of California, county [or city and county] of ——. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the superior court of the county, or city and county of —, and there being no executor named in the will (or as the case may be), C. D. is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the superior court of the county, or city and county of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court. G. H., Clerk.—*Kerr's Cyc. Code Civ. Proc.*, § 1361.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 785.  
 Colorado—Mills's Statutes of 1912, section 7930.  
 Idaho\*—Compiled Statutes of 1919, section 7485.  
 Montana\*—Revised Codes of 1907, section 7430.  
 Nevada—Revised Laws of 1912, section 5893.  
 North Dakota—Compiled Laws of 1913, section 8690.  
 Oklahoma—Revised Laws of 1910, section 6243.  
 Oregon—Lord's Oregon Laws, section 1175.  
 South Dakota\*—Compiled Laws of 1913, section 5703.  
 Utah\*—Compiled Laws of 1907, section 3805.  
 Wyoming—Compiled Statutes of 1910, section 5525.

**§ 237. Form. Oath of administrator with the will annexed.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
 [Title of form.]

State of —, }  
 County <sup>2</sup> of —, } ss.

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of —, and that I will faithfully perform, according to law,

the duties of administrator <sup>3</sup> with the will annexed of the estate of —, deceased.

Subscribed and sworn to before me this — day of —, 19—. —, Deputy Clerk.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, City and County. <sup>3</sup> Or, administratrix. This oath is to be attached to the letters, and the letters must be recorded: See § 275, post.

**§ 238. Form. Clerk's certificate that letters of administration with the will annexed have been recorded.**

[Title of court.]

[Title of estate.]

State of —, }  
County <sup>2</sup> of —, } ss.

{ No. —. <sup>1</sup> Dept. No. —,  
[Title of form.]

I, —, county clerk of the county <sup>2</sup> of —, and ex officio clerk of the — <sup>4</sup> court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the letters of administration with the will annexed in the matter of the estate of —, deceased, now on file and of record in my office; and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

Witness my hand and the seal of said court this — day of —, 19—. —, Clerk.

[Seal]

By —, Deputy Clerk.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2,3</sup> Or, City and County. <sup>4</sup> Title of court.

**§ 239. Form of letters of administration.**

Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of California, county, or city and county of —. C. D. is hereby appointed administrator of the estate of A. B., deceased. (Seal.) Witness, G. H., clerk of the superior court of the county, or city and county of —, with the seal thereof affixed, the — day of —, A. D. 18—. By order of the court. G. H., Clerk. —*Kerr's Cyc. Code Civ. Proc.*, § 1362.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1631.  
 Arizona—Revised Statutes of 1913, paragraph 786.  
 Colorado—Mills's Statutes of 1912, section 7930.  
 Idaho\*—Compiled Statutes of 1919, section 7486.  
 Montana\*—Revised Codes of 1907, section 7431.  
 Nevada—Revised Laws of 1912, section 5909.  
 North Dakota—Compiled Laws of 1913, section 8691.  
 Oklahoma—Revised Laws of 1910, section 6244.  
 Oregon—Lord's Oregon Laws, section 1175.  
 South Dakota\*—Compiled Laws of 1913, section 5704.  
 Utah\*—Compiled Laws of 1907, section 3820.  
 Washington—Remington's 1915 Code, section 1393.  
 Wyoming—Compiled Statutes of 1910, section 5526.

## § 240. Form. Oath of administrator or administratrix.

[Title of court.]

[Title of estate.]

{ No. —. Dept. No. —.  
 [Title of form.]

State of —, }  
 County <sup>1</sup> of —, } ss.

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of —, and that I will faithfully discharge the duties of administrator <sup>2</sup> of the estate of —, deceased, according to law.

Subscribed and sworn to before me this — day of —, 19—. —, Deputy County Clerk.

Explanatory notes.—<sup>1</sup> Or, City and County. <sup>2</sup> Or, administratrix. This oath is to be attached to the letters, and the letters must be recorded: See § 275, post.

## § 241. Form. Clerk's certificate that letters of administration have been recorded.

[Title of court.]

[Title of estate.]

{ No. —.<sup>1</sup> Dept. No. —.  
 [Title of form.]

State of —, }  
 County <sup>2</sup> of —, } ss.

I, —, county clerk of the county <sup>3</sup> of —, and ex officio clerk of the — <sup>4</sup> court thereof, do hereby certify

the foregoing to be a full, true, and correct copy of the letters of administration in the matter of the estate of —, deceased, now on file and of record in my office; and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

Witness my hand and the seal of said court this — day of —, 19—.

[Seal]

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2, 3 Or, City and County.  
4 Title of court.

#### OATH, AND SEAL TO LETTERS.

1. Oath required.
2. Necessity of seal to letters.
3. Effect of omitting seal.

1. *Oath required.*—No person can fill the position of executor or administrator until he has qualified according to law, and no recognition by the probate court can make him an officer de facto.—*Pryor v. Downey*, 50 Cal. 388, 399, 19 Am. Rep. 656; *Estate of Hamilton*, 34 Cal. 464, 469. If a person has been named in the will as executor, he is not a trustee for the estate until he qualifies, although he has actually applied for letters. His refusal or neglect to qualify is a disclaimer of the trust.—*Bowden v. Pierce*, 73 Cal. 459, 463, 14 Pac. 302, 15 Pac. 64. Where the estimated value of the estate was forty-five thousand dollars, it was objected that the executor did not properly qualify, so as to entitle him to enter upon the discharge of his trust; but the court held that the objection could not prevail, since the will fixed the amount of the bond at twenty thousand dollars, and the bond in that sum was executed and approved by the county court. This provision of the will was said to be reasonable, and the bond designated having been given, it was deemed unnecessary to require the executor to take the oath prescribed in cases where the undertaking is wholly dispensed with.—*In re Conser's Estate*, 40 Or. 138, 66 Pac. 607, 609.

2. *Necessity of seal to letters.*—It is not necessary to affix a seal of the court to any other matter contained on the sheet or page upon which the letters of administration are written, but it is necessary to affix one to the letters, and the affixing of a seal upon the paper on which the letters are written is a substantial compliance with the law.—*Sharp v. Dye*, 64 Cal. 9, 11, 27 Pac. 789. The probate seal of a probate judge adopted as the seal of the probate court is entitled to full credit as such.—*Ward v. Moorey*, 1 Wash. Ter. 104.

3. *Effect of omitting seal.*—The purpose of the seal is to authenticate the letters, but where the court has recognized one as administrator,  
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the fact that the seal has been omitted from the letters of administration, although the letters recite that the seal was affixed, can not be made the basis for a collateral attack. The absence from the letters of the impress of the seal does not impair their effect, in a collateral action, as evidence of the administrator's authority.—Dennis v. Bint, 122 Cal. 39, 68 Am. St. Rep. 17, 54 Pac. 378, 380.

## CHAPTER III.

LETTERS OF ADMINISTRATION. TO WHOM AND THE ORDER  
IN WHICH THEY ARE GRANTED.

- § 242. Order of persons entitled to administer; partner not to administer.
- § 243. Preference of persons equally entitled.
- § 244. In discretion of court to appoint administrator when.
- § 245. When minor or incompetent is entitled, who must be appointed.
- § 246. Who are incompetent to act as administrators.
- § 247. Married woman may be administratrix.

## § 242. Order of persons entitled to administer; partner not to administer.

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his estate or some portion thereof; and they are, respectively, entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father and mother.
4. The brothers and sisters.
5. The grandchildren.
6. The next of kin entitled to share in the distribution of the estate.
7. The public administrator.
8. The creditors.
9. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate. This section shall apply to the relatives of the previously deceased spouse of decedent when entitled to succeed to some por-

tion of the estate under subdivision eight of section one thousand three hundred eighty-six of the Civil Code.—*Kerr's Cyc. Code Civ. Proc.*, § 1365.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, sections 1606, 1608.

Arizona—Revised Statutes of 1913, paragraph 787.

Colorado—Mills's Statutes of 1912, section 7903.

Hawaii—Revised Laws of 1915, section 2490.

Idaho—Compiled Statutes of 1919, section 7487.

Kansas—General Statutes of 1915, section 4496.

Montana—Revised Codes of 1907, section 7432.

Nevada—Revised Laws of 1912, section 5894, as amended by Statutes of 1913, chapter 36, page 28; and by Statutes of 1917, chapter 192, page 355.

North Dakota—Compiled Laws of 1913, sections 8656, 8657.

Oklahoma—Revised Laws of 1910, section 6245.

Oregon—Lord's Oregon Laws, sections 1150, 1152.

South Dakota—Compiled Laws of 1913, section 5705.

Utah—Compiled Laws of 1907, sections 3812, 3815.

Washington—Laws of 1917, chapter 156, page 656, sections 61, 88.

Wyoming—Compiled Statutes of 1910, section 5502.

#### § 243. Preference of persons equally entitled.

Of several persons claiming and equally entitled to administer, relatives of the whole blood must be preferred to those of the half blood.—*Kerr's Cyc. Code Civ. Proc.*, § 1366.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 788.

Idaho—Compiled Statutes of 1919, section 7488.

Montana—Revised Codes of 1907, section 7433.

Nevada—Revised Laws of 1912, section 5895.

North Dakota—Compiled Laws of 1913, section 8663.

Oklahoma—Revised Laws of 1910, section 6246.

South Dakota—Compiled Laws of 1913, section 5706.

Utah—Compiled Laws of 1907, section 3813.

#### § 244. In discretion of court to appoint administrator when.

When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters the

court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent.—*Kerr's Cyc. Code Civ. Proc.*, § 1367.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 789.  
 Idaho\*—Compiled Statutes of 1919, section 7489.  
 Montana—Revised Codes of 1907, section 7434.  
 Nevada—Revised Laws of 1912, section 5896.  
 North Dakota—Compiled Laws of 1913, section 8663.  
 Oklahoma\*—Revised Laws of 1910, section 6247.  
 South Dakota\*—Compiled Laws of 1913, section 5707.  
 Utah—Compiled Laws of 1907, section 3813.  
 Wyoming—Compiled Statutes of 1910, section 5503.

#### § 245. When minor or incompetent is entitled, who must be appointed.

If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1368.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 790.  
 Colorado—Mills's Statutes of 1912, section 7909.  
 Idaho—Compiled Statutes of 1919, section 7490.  
 Montana—Revised Codes of 1907, section 7435.  
 North Dakota—Compiled Laws of 1913, section 8657.  
 Oklahoma—Revised Laws of 1910, section 6248.  
 South Dakota—Compiled Laws of 1913, section 5708.  
 Utah—Compiled Laws of 1907, sections 3813, 3815.

#### § 246. Who are incompetent to act as administrators.

No person is competent or entitled to serve as administrator or administratrix who is:

1. Under the age of majority.
2. Not a bona fide resident of the state.
3. Convicted of an infamous crime.
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvi-

dence, or want of understanding or integrity.—*Kerr's Cyc. Code Civ. Proc.*, § 1369.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1629.  
 Arizona—Revised Statutes of 1913, paragraph 791.  
 Colorado—Mills's Statutes of 1912, section 7909.  
 Idaho\*—Compiled Statutes of 1919, section 7491.  
 Kansas—General Statutes of 1915, section 4512.  
 Montana—Revised Codes of 1907, section 7436.  
 Nevada—Revised Laws of 1912, section 5897.  
 New Mexico—Statutes of 1915, section 2223.  
 North Dakota—Compiled Laws of 1913, sections 8657, 8682.  
 Oklahoma—Revised Laws of 1910, section 6249.  
 Oregon—Lord's Oregon Laws, section 1173.  
 South Dakota—Compiled Laws of 1913, section 5709.  
 Utah—Compiled Laws of 1907, section 3815.  
 Washington—Laws of 1917, chapter 156, page 663, section 87.  
 Wyoming—Compiled Statutes of 1910, section 5504.

#### § 247. Married woman may be administratrix.

A married woman may be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is not thereby extinguished.—*Kerr's Cyc. Code Civ. Proc.*, § 1370.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 792.  
 Hawaii—Revised Laws of 1915, section 2953.  
 Idaho—Compiled Statutes of 1919, section 7492.  
 Montana\*—Revised Codes of 1907, section 7437.  
 Nevada—Revised Laws of 1912, section 5898.  
 North Dakota—Compiled Laws of 1913, sections 8657, 8682.  
 South Dakota—Compiled Laws of 1913, section 5710.  
 Utah—Compiled Laws of 1907, section 3816.  
 Wyoming\*—Compiled Statutes of 1910, section 5505.

## CHAPTER IV.

### PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.

- § 248. Applications, how made.
- § 249. Form. Petition for letters of administration.
- § 250. Form. Petition by corporation for letters of administration.
- § 251. Form. Petition for letters, etc., to others than those entitled.
- § 252. When granted.
- § 253. Notice of application. Day of hearing to be set by clerk.
- § 254. Form. Notice of hearing of petition for letters of administration.
- § 255. Contesting application. Hearing.
- § 256. Form. Affidavit of posting of notice of hearing of application for letters of administration. (By deputy county clerk.)
- § 257. Form. Affidavit of posting of notice of hearing of application for letters of administration. (By any person over twenty-one years of age.)
- § 258. Form. Objections to appointment of administrator.
- § 259. Form. Order that application for letters and contest for letters be heard together.
- § 260. Hearing of proofs and issuance of letters.
- § 261. Form. Order appointing administrator.
- § 262. Evidence of notice.
- § 263. Grant to any applicant.
- § 264. What proofs must be made before granting letters of administration.
- § 265. Request in writing. Letters may issue to whom.
- § 266. Form. Request for another's appointment as administrator.
- § 266.1 Special notice to heirs, devisees and legatees during administration.

### LETTERS OF ADMINISTRATION.

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| <ul style="list-style-type: none"> <li>1. Granting or refusing of administration.                             <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) New, or further letters.</li> </ul> </li> <li>2. Jurisdiction of courts.</li> <li>3. Preliminary proof.</li> <li>4. Letters on estate of minor.</li> <li>5. Petition for letters.                             <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) Application by creditors.</li> <li>(3) Construction of statute.</li> <li>(4) Statement of facts.</li> <li>(5) Sufficiency of petition.</li> <li>(6) To be granted in what court and county.</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>(7) Withdrawal of petition. Effect of.</li> <li>6. Order of appointment.</li> <li>7. Who are entitled to letters.</li> <li>8. Priority. Preference.</li> <li>9. Right to nominate. Letters to others than those entitled.                             <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) Non-residents.</li> </ul> </li> <li>10. Letters where several are equally entitled.</li> <li>11. Discretion of court.</li> <li>12. Notice and hearing.</li> <li>13. Contest of application.                             <ul style="list-style-type: none"> <li>(1) In general.</li> </ul> </li> </ul> |
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| (2) What questions are involved.         | 20. Competency. Disqualification to act. |
| (3) Who may appear and contest.          | (1) In general.                          |
| (4) Allegations. Proof. Presumption.     | (2) Want of understanding.               |
| 14. Waiver of right. Delay.              | (3) Drunkenness.                         |
| 15. Validity of appointment and letters. | (4) Improvidence.                        |
| 16. Collateral attack.                   | (5) Want of integrity.                   |
| 17. Order granting letters. Effect of.   | (6) Competency of widow or her nominee.  |
| 18. Vesting of appointee with office.    | (7) Right of incompetent to nominate.    |
| 19. Who are not entitled to appointment. | 21. Non-residents.                       |
|  | 22. Appeal.                              |

#### § 248. Applications, how made.

Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residences of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts exist, and are proved at the hearing but are not fully set forth in the petition, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments.—*Kerr's Cyc. Code Civ. Proc.*, § 1371.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1613.
- Arizona\*—Revised Statutes of 1913, paragraph 793.
- Hawaii—Revised Laws of 1915, sections 2488, 2489.
- Idaho—Compiled Statutes of 1919, section 7493.
- Montana—Revised Codes of 1907, section 7438.
- Nevada—Revised Laws of 1912, section 5899.
- New Mexico—Statutes of 1915, section 2226.
- North Dakota—Compiled Laws of 1913, sections 8569, 8659.
- Oklahoma—Revised Laws of 1910, section 6250.
- Oregon—Lord's Oregon Laws, section 1157.
- South Dakota—Compiled Laws of 1913, section 5711.
- Utah—Compiled Laws of 1907, section 3817.
- Washington—Laws of 1917, chapter 156, page 657, section 62.
- Wyoming—Compiled Statutes of 1910, section 5513.

§ 249. Form. Petition for letters of administration.

[Title of court.]

[Title of estate.]

{ Department No. —.  
[Title of form.] }

To the Honorable —, Judge of the — Court of the  
County <sup>1</sup> of —, State of —.

The petition of —, of said county,<sup>2</sup> respectfully  
shows:

That — died on or about the — day of —, 19—,  
in the county <sup>3</sup> of —, state of —;

That said deceased, at the time of his <sup>4</sup> death, was a  
resident of the county <sup>5</sup> of —, state of —;

That said deceased left estate in the county <sup>6</sup> of —,  
state of —, consisting of — <sup>7</sup> property;

That the value, character, and annual revenue of said  
property are as follows, to wit: —;<sup>8</sup>

That the estate and effects for or in respect to which  
letters of administration are hereby applied for do not  
exceed the value of — dollars (\$—);<sup>9</sup>

That the names, ages, and residences of the next of kin  
of said deceased, and whom your petitioner is advised  
and believes, and therefore alleges, to be the heirs at law  
of said deceased, are as follows, viz.:

Names.	Ages.	Residences.
—	—	—
—	—	—

That due search and inquiry have been made to ascer-  
tain if said deceased left any will and testament, but none  
has been found, and, according to the best knowledge,  
information, and belief of your petitioner, said deceased  
died intestate;

That your petitioner is a son<sup>10</sup> of said deceased, one of  
his heirs at law, and entitled to share in the distribution  
of his estate, if said deceased died intestate, and there-  
fore, as your petitioner is advised and believes, is en-  
titled to letters of administration upon said estate.<sup>11</sup>

Wherefore your petitioner prays that a day of court



may be appointed for hearing this application; that the clerk of this court be directed to give due notice thereof by posting notices according to law; and that, upon said hearing and the proofs to be adduced, letters of administration of said estate may be issued to your petitioner.

Dated —, 19—.

—, Petitioner.

—, Attorney for Petitioner.

**Explanatory notes.**—1-3 Or, City and County. 4 Or, her. 5, 6 Or, city and county. 7 Real and personal, or either, as the case may be. 8 Give details. 9 State amount. 10 Or according to the fact. 11 In case the public administrator applies for letters, say, "That your petitioner is the public administrator of said county [or city and county]; that decedent left no known heirs"; or, "That no party entitled to administer has applied for letters; and that your petitioner is entitled to letters of administration."

**§ 250. Form. Petition by corporation for letters of administration.**

[Title of court.]

[Title of estate.]

{ Department No. —.  
[Title of form.]

The petition of the — Company respectfully shows:

That petitioner is a corporation organized and existing under the laws of the state of —, and is authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository, or trustee, and has a paid-up capital of not less than — thousand dollars (\$—), of which — thousand dollars (\$—) has been actually paid in, in cash, and has deposited with the treasurer of said estate for the benefit of its creditors the further sum of — thousand dollars (\$—), in bonds and securities, in compliance with the provisions of law;<sup>1</sup> which said bonds and securities are now held by said treasurer, in his official capacity, for the uses and purposes aforesaid, and that petitioner has complied with all the requirements of said act, and has procured from the board of bank commissioners of the state of — a certificate of authority stating that it has complied with the requirements of said act and is authorized

to act as executor, administrator, guardian, assignee, receiver, depository, or trustee.<sup>2</sup>

**Explanatory notes.**—1 Designate the act giving authority. 2 Proceed as in an ordinary petition for letters of administration by an individual: "That — died," etc.

**§ 251. Form. Petition for letters, etc., to others than those entitled.**

[Title of court.]

[Title of estate.]

{ Department No. —.  
[Title of form.]

This form is the same as the ordinary petition for letters of administration (see § 249), except the last paragraph before the prayer. In the place of said last paragraph substitute the following:

That the person entitled to letters of administration on said estate, to wit, —, declines to act as administrator<sup>1</sup> thereof, and has made and filed herein a written request that your petitioner, a competent person, be appointed in his stead as such administrator;<sup>2</sup> and that said request is annexed hereto and made a part hereof, the same as if incorporated herein.

**Explanatory notes.**—1, 2 Or, administratrix.

**§ 252. When granted.**

Letters of administration may be granted by the court at any time appointed for the hearing of the application, or at any time to which the hearing is continued or postponed.—*Kerr's Cyc. Code Civ. Proc.*, § 1372.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 794.

Idaho—Compiled Statutes of 1919, section 7494.

Montana\*—Revised Codes of 1907, section 7439.

Oklahoma—Revised Laws of 1910, section 6255.

South Dakota—Compiled Laws of 1913, section 5712.

Wyoming\*—Compiled Statutes of 1910, section 5514.

**§ 253. Notice of application. Day of hearing to be set by clerk.**

When a petition praying for letters of administration is filed, the clerk of the court must set the petition for hearing by the court, and give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing.—*Kerr's Cyc. Code Civ. Proc.*, § 1373.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 795.

Idaho—Compiled Statutes of 1919, section 7495.

Montana\*—Revised Codes of 1907, section 7440.

Nevada—Revised Laws of 1912, section 5899.

North Dakota—Compiled Laws of 1913, section 8659.

Oklahoma—Revised Laws of 1910, section 6251.

South Dakota—Compiled Laws of 1913, section 5713.

Utah—Compiled Laws of 1907, section 3818.

Washington—Laws of 1917, chapter 156, page 657, section 63.

Wyoming—Compiled Statutes of 1910, section 5515.

**§ 254. Form. Notice of hearing of petition for letters of administration.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

Notice is hereby given, That — has filed with the clerk of the —<sup>2</sup> court of the county<sup>3</sup> of —, state of —, a petition praying for the issuance to him of letters of administration upon the estate of —, deceased; and that the hearing of said petition will be had before the —<sup>4</sup> court, at the court-house in the county<sup>5</sup> of —, on the — day of —, 19—, at — o'clock in the forenoon<sup>6</sup> of said day, at which time and place all persons interested in said estate are notified to appear and contest the same, if they choose.

—, Clerk.

Dated —, 19—.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Title of court. 3 Or, city and county. 4 Title of court. 5 Or, city and county. 6 Or, afternoon.

§ 255. Contesting application. Hearing.

Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. In the latter case the contestant must file a petition and give the notice required for an original petition, and the court must hear the two petitions together.—*Kerr's Cyc. Code Civ. Proc.*, § 1374.

ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 796.

Idaho\*—Compiled Statutes of 1919, section 7496.

Montana\*—Revised Codes of 1907, section 7441.

Nevada—Revised Laws of 1912, section 5900.

North Dakota—Compiled Laws of 1913, section 8660.

Oklahoma—Revised Laws of 1910, section 6252.

South Dakota\*—Compiled Laws of 1913, section 5714.

Utah\*—Compiled Laws of 1907, section 3819.

Wyoming—Compiled Statutes of 1910, section 5516.

§ 256. Form. Affidavit of posting of notice of hearing of application for letters of administration. (By deputy county clerk.)

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

State of —, }  
County 2 of —, } ss.

—, deputy county clerk of said county,3 being duly sworn, says: That he is, and at all times hereinafter named was, a deputy county clerk of said county,4 a male citizen of the United States, over the age of twenty-one years, and not interested in the estate of —, deceased; that he is competent to be a witness in the matter of said estate; and that on the — day of —, 19—, at the request and under the direction of the clerk of said court,

he posted three notices, of which the annexed is a copy, in three of the most public places in said county,<sup>5</sup> to wit, one at the place at which the court is held,<sup>6</sup> one at —,<sup>7</sup> and one at —.<sup>8</sup>

Subscribed and sworn to before me this — day of —, 19—. —, County Clerk.

**Explanatory notes.**—1 Give file number. 2-5 Or, City and County. 6 Designating it. 7 As, at the United States post-office, etc. 8 As, at the city hall. This affidavit should be attached to the notice.

**§ 257. Form. Affidavit of posting of notice of hearing of application for letters of administration. (By any person over twenty-one years of age.)**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

—, of said county, being duly sworn, deposes and says: That he is, and at all times hereinafter mentioned was, a white male citizen of the United States, over the age of twenty-one years, and not interested in said estate; that he is competent to be a witness in the matter of said estate; and that on the — day of —, 19—, at the request and under the direction of the clerk of said court, he duly posted exact and true copies of the within notice in three of the most public places within said county <sup>3</sup> of —, to wit, one copy at —,<sup>4</sup> in said county, one at —,<sup>5</sup> and one at the court-house where said —<sup>6</sup> court of the county <sup>7</sup> of — is held.<sup>8</sup>

Subscribed and sworn to before me this — day of —, 19—. —, Clerk.

By —, Deputy Clerk.

**Explanatory notes.**—1 Give file number. 2, 3 Or, City and County. 4 As, at the United States post-office in the town or city of —. 5 As, at the city hall, etc. 6 Title of court. 7 Or, city and county. 8 Stating location of court-house. This affidavit should be attached to the notice.

§ 258. Form. Objections to appointment of administrator.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The petition of —, praying that letters of administration on the estate of —, deceased, be granted to him, the said —, having been filed herein, —

Now comes —, a son <sup>2</sup> of said deceased, and files this, his written opposition to the granting of said petition, and for reasons why the said petitioner should not be appointed alleges:

That said petitioner, —, is under the age of majority;

That said petitioner, —, is not a bona fide resident of this state;

That said petitioner, —, has been convicted of an infamous crime, to wit, the crime of —;<sup>3</sup> and that said conviction was had in the court of the county of —, state of —, on the — day of —, 19—;

That said petitioner is incompetent to perform the duties of administrator of said estate because of his want of understanding, in this, —;<sup>4</sup>

That said petitioner is incompetent to perform the duties of administrator of said estate because of drunkenness;

That said petitioner is incompetent to perform the duties of administrator of said estate because of improvidence in this, —;<sup>5</sup>

That said petitioner is incompetent to perform the duties of administrator of said estate because of his want of integrity, in this —;<sup>6</sup>

That said contestant is entitled, after petitioner, to letters of administration on said estate; and that he has filed in this court his application to be appointed administrator of said estate.

Wherefore contestant prays that this contest and said application be heard together; that the application of

said — for letters of administration be denied; and that letters issue to this contestant.

—, Petitioner.

—, Attorney for Petitioner.

**Explanatory notes.**—1 Give file number. 2 Or, according to the fact. 3 Name the crime. 4 State facts showing want of understanding; as, lack of knowledge of the English language, etc. 5 State facts showing improvidence. 6 State facts showing want of integrity. Concerning objections, see also § 225, ante.

**§ 259. Form. Order that application for letters and contest for letters be heard together.**

[Title of court.]

[Title of estate.]

{ No. —, 1 Dept. No. —.  
[Title of form.]

It is ordered that the application of — for letters of administration upon the estate of —, deceased, and the contest of —, opposing the petition of the said —, and the petition of said contestant, —, asserting his own rights to the administration, and asking that letters of administration be granted to him upon said estate, be set for hearing, at the court-room of this court, at —, 2 on the — day of —, 19—, at the hour of — o'clock, in the forenoon 3 of said day, and that the same be heard together.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2 State location of court-room. 3 Or, afternoon, as the case may be.

**§ 260. Hearing of proofs and issuance of letters.**

On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.—*Kerr's Cyc. Code Civ. Proc.*, § 1375.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 797.

Idaho\*—Compiled Statutes of 1919, section 7497.

Montana\*—Revised Codes of 1907, section 7442.  
 Nevada—Revised Laws of 1912, section 5901.  
 Oklahoma\*—Revised Laws of 1910, section 6253.  
 South Dakota\*—Compiled Laws of 1913, section 5715.  
 Wyoming—Compiled Statutes of 1910, section 5517.

§ 261. Form. Order appointing administrator.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
 [Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the petition for letters of administration herein was filed on —, 19—; that on the same day the time for hearing the same was by the clerk duly set for the — day of —, 19—; and that notice of said hearing has been duly given as required by law,<sup>2</sup> and it appearing that petitioner is legally competent, and no person appearing to contest said petition, the court proceeds to hear the evidence, and thereupon finds that the facts therein alleged are true, and that said petition ought to be granted.

It is therefore ordered and adjudged by the court, That said — died on the — day of —, 19—; that he left estate in the said state of —, and was then a resident of the county<sup>3</sup> of —, in said state; that — be appointed administrator of the estate of said —, deceased; and that letters of administration thereon issue to him upon his taking the oath required by law, and giving bond in the sum of — dollars (\$—).

—, County Clerk.

Entered —, 19—.

By —, Deputy.<sup>4</sup>

Explanatory notes.—1 Give file number. 2 If the matter has been continued, say: "and the hearing having been regularly continued to this time." 3 Or, city and county. 4 See note § 77, ante.

§ 262. Evidence of notice.

An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive



evidence of the fact of such notice.—*Kerr's Cyc. Code Civ. Proc.*, § 1376.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 798.

Idaho\*—Compiled Statutes of 1919, section 7498.

Montana—Revised Codes of 1907, section 7443.

Nevada\*—Revised Laws of 1912, section 5902.

Oklahoma\*—Revised Laws of 1910, section 6254.

South Dakota\*—Compiled Laws of 1913, section 5716.

**§ 263. Grant to any applicant.**

Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves.—*Kerr's Cyc. Code Civ. Proc.*, § 1377.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 799.

Idaho\*—Compiled Statutes of 1919, section 7499.

Montana\*—Revised Codes of 1907, section 7444.

Nevada\*—Revised Laws of 1912, section 5903.

North Dakota—Compiled Laws of 1913, section 8663.

Oklahoma\*—Revised Laws of 1910, section 6255.

South Dakota\*—Compiled Laws of 1913, section 5717.

Utah—Compiled Laws of 1907, section 3814.

Washington—Laws of 1917, chapter 156, page 656, section 61.

Wyoming—Compiled Statutes of 1910, section 5518.

**§ 264. What proofs must be made before granting letters of administration.**

Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.—*Kerr's Cyc. Code Civ. Proc.*, § 1378.

ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 800.  
 Colorado—Mills's Statutes of 1912, section 7903.  
 Idaho\*—Compiled Statutes of 1919, section 7500.  
 Montana\*—Revised Codes of 1907, section 7445.  
 Nevada\*—Revised Laws of 1912, section 5904.  
 North Dakota—Compiled Laws of 1913, section 8662.  
 Oklahoma\*—Revised Laws of 1910, section 6256.  
 South Dakota\*—Compiled Laws of 1913, section 5718.

§ 265. Request in writing. Letters may issue to whom.

Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the state, affidavits, taken ex parte before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state, may be received as prima facie evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1379.

ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 801.  
 Idaho—Compiled Statutes, section 7501.  
 Montana\*—Revised Codes of 1907, section 7446.  
 Nevada—Revised Laws of 1912, section 5905.  
 North Dakota—Compiled Laws of 1913, section 8661.  
 Oklahoma\*—Revised Laws of 1910, section 6257.  
 South Dakota\*—Compiled Laws of 1913, section 5719.  
 Utah—Compiled Laws of 1907, section 3812.  
 Wyoming\*—Compiled Statutes of 1910, section 5519.

§ 266. Form. Request for another's appointment as administrator.

[Title of court.]

[Title of estate.]

{ Department No. —.  
 [Title of form.]

To the Honorable the —<sup>1</sup> Court of the County<sup>2</sup> of —,  
 State of —.

The undersigned, the surviving wife of —, deceased,  
 is entitled to letters of administration upon his estate,

but declines to undertake such administration, waives her right to be appointed administratrix of said estate, and respectfully requests this court to appoint, in her stead, as such administratrix,<sup>3</sup> —, a resident of the county<sup>4</sup> of —, state of —, a competent person to serve as such administratrix,<sup>5</sup> but who is not entitled to receive said letters of administration except at the request of the person so entitled as aforesaid, and whose petition for letters of administration of said estate is herewith presented and filed at the request of the undersigned.

— (Widow of —, deceased.)

**Explanatory notes.**—1 Title of court. 2 Or, City and County. 3 Or, administrator. 4 Or, city and county. 5 Or, administrator.

**§ 266.<sup>1</sup> Special notices to heirs, devisees and legatees during administration.**

At any time after the issuance of letters testamentary or of administration upon the estate of any decedent, any person interested in said estate (including the state controller), whether as heir, devisee, legatee or creditor, or the attorney for any such person may serve upon the executor or administrator (or upon the attorney for the executor or administrator) and file with the clerk of the court wherein administration of such estate is pending, a written request, stating that he desires special notice of any or all of the following mentioned matters, steps or proceedings in the administration of said estate, to wit:

1. Filing of petitions for sales, leases or mortgages of any property of the estate.
2. Filing of accounts.
3. Filing of petitions for distribution.
4. Filing of petitions for partition of any property of the estate.

**POST-OFFICE ADDRESS.**—Such request shall state the post-office address of the person making same, and thereafter a brief notice of the filing of any of such petitions or ac-

counts, except petitions for sale of perishable property or other personal property which will incur expense or loss by keeping, shall be addressed to such person making such request, or his attorney, at his stated post-office address, and deposited in the United States post-office with the postage thereon prepaid, within two days after filing of such petition or account; or personal service of such notices may be made on the person making such request or his attorney, within said two days, and such personal service shall be equivalent to such deposit in the post-office, and proof of mailing or of personal service must be filed with the clerk before the hearing of such petition or account. If upon the hearing it shall appear to the satisfaction of the court that the said notice has been regularly given, the court shall so find in its order or judgment and such judgment shall be final and conclusive upon all persons.—*Kerr's Cyc. Code Civ. Proc.*, § 1380.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

South Dakota—Compiled Laws of 1913, section 5720.

Washington—Laws of 1917, chapter 156, page 657, section 64.

LETTERS OF ADMINISTRATION.

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| <p>1. Granting or refusing of administration.</p> <p>(1) In general.</p> <p>(2) New, or further letters.</p> <p>2. Jurisdiction of courts.</p> <p>3. Preliminary proof.</p> <p>4. Letters on estate of minor.</p> <p>5. Petition for letters.</p> <p>(1) In general.</p> <p>(2) Application by creditors.</p> <p>(3) Construction of statute.</p> <p>(4) Statement of facts.</p> <p>(5) Sufficiency of petition.</p> <p>(6) To be granted in what court and county.</p> <p>(7) Withdrawal of petition. Effect of.</p> <p>6. Order of appointment.</p> <p>7. Who are entitled to letters.</p> <p>8. Priority. Preference.</p> | <p>9. Right to nominate. Letters to others than those entitled.</p> <p>(1) In general.</p> <p>(2) Non-residents.</p> <p>10. Letters where several are equally entitled.</p> <p>11. Discretion of court.</p> <p>12. Notice and hearing.</p> <p>13. Contest of application.</p> <p>(1) In general.</p> <p>(2) What questions are involved.</p> <p>(3) Who may appear and contest.</p> <p>(4) Allegations. Proof. Presumption.</p> <p>14. Waiver of right. Delay.</p> <p>15. Validity of appointment and letters.</p> |
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| 16. Collateral attack.                   | (3) Drunkenness.                        |
| 17. Order granting letters. Effect of.   | (4) Improvidence.                       |
| 18. Vesting of appointee with office.    | (5) Want of integrity.                  |
| 19. Who are not entitled to appointment. | (6) Competency of widow or her nominee. |
| 20. Competency. Disqualification to act. | (7) Right of incompetent to nominate.   |
| (1) In general.                          | 21. Non-residents.                      |
| (2) Want of understanding.               | 22. Appeal.                             |

### 1. Granting or refusing of administration.

(1) *In general.*—Under the statute of Idaho it is not absolutely necessary that administration be had of an estate of an intestate, when there are no debts against such estate, and heirs have made a satisfactory distribution of the assets of such estate among themselves.—*Gwinn v. Melvin*, 9 Ida. 202, 108 Am. St. Rep. 119, 2 Ann. Cas. 770, 72 Pac. 961. If the court denies probate to a will, it is not authorized to appoint an administrator, unless the proceedings therefor are in conformity with the steps prescribed in cases of intestacy.—*Estate of Bouyssou*, 3 Cal. App. 39, 84 Pac. 460. Whatever the law may be in other jurisdictions, there is nothing in the probate law of California which would, either expressly or by implication, exempt the property of an estate from the requirement of administration. The whole subject-matter of dealing with the assets of deceased persons is one of statutory regulation, and the policy and intent of the statute of that state very clearly contemplates that the property of decedents, left undisposed of at death (except in the instance of the homestead, acquired under certain circumstances as provided for in the statute), shall, for the purpose of ascertaining and protecting the rights of creditors or heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedent may be conclusively established. And such administration may be initiated and had at the instance of any person entitled under the law to administer upon the estate.—*Estate of Strong*, 119 Cal. 663, 665, 51 Pac. 1078. No administration of the personal estate of an intestate is necessary when there are no creditors. The heirs, in such case, may divide the assets of the estate among themselves, in kind or otherwise, by mutual agreement. When so divided, each will become the owner in severalty of the portions so received.—*Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574. It is clearly contemplated by statute that the undisposed of property of decedents shall be subjected to the process of administration in the probate court.—*Trout v. Ogilvie*, — Cal. App. —, 182 Pac. 333, 336. If the administrator finds, or in good faith believes, that those named as heirs in the affidavit accompanying his application for letters are not in fact heirs, common honesty would require him to so report to the court.—*State v. Clifford*, 78 Wash. 555, 559, 139 Pac. 650.

REFERENCES.

Validity of grants of administration.—See notes 81 Am. St. Rep. 535-562, 79 Am. Dec. 65-67. Dispensing with administration of estate.—See note 112 Am. St. Rep. 729-731. Necessity of administration in devolution of decedent's personalty.—See note 15 L. R. A. 491. Invalidity of agreement to administer and distribute a decedent's estate, without obtaining letters of administration.—See note 12 L. R. A. (N. S.) 613. When and how the granting of letters of administration may be prevented.—See note 46 Am. Dec. 437-440. Administration in general.—See note § 378, post. Widow's right to administer on the estate of her deceased husband.—See note 93 Am. Dec. 685, 686. Collateral impeachmentability of findings as to jurisdictional facts on which administration of a decedent's estate is founded.—See note 18 L. R. A. 242-244.

(2) New, or further letters.—It is well established that after final settlement of an estate, the court having probate jurisdiction is not bound to issue further letters of administration, and should not do so unless there still remains property of the estate not fully disposed of, or some act to be done relating thereto which only an administrator can do. This is implied by section 1698, Code of Civil Procedure of California, providing that the final settlement of an estate, as provided in the code, shall not prevent the issuance of further letters of administration thereon if other property of the estate be discovered, or if a good cause appears therefor. The implication is that there should be no issue of subsequent letters, where no other property is discovered and no good cause appears therefor.—*O'Brien v. Nelson*, 164 Cal. 573, 129 Pac. 985. On the admission of a will to probate, the giving of due notice to creditors, the payment of all debts and expenses of administration, and the settlement of the accounts of the executors, the court is not required to grant letters, for the purpose of determining anew the proper distribution of the estate, on request of one claiming under a devisee who participated, years before, in a voluntary distribution, without objection, and who received and retained the benefits.—*Estate of Yorba*, 176 Cal. 166, 167 Pac. 854, 856. An estate having been finally settled and distribution having been made, there should be no further issue of letters of administration, unless there still remains property of the estate not fully disposed of, or some act relating thereto, and which only an administrator can do, remains to be done.—*Estate of Yorba*, 176 Cal. 166, 167 Pac. 854.

2. Jurisdiction of courts.—Where a resident of one county of a state dies in another county of the same state, with property or business matters requiring immediate attention, it is doubtless true that the probate court of the latter county has jurisdiction over the estate of that county for the purpose of appointing a special administrator to conserve the property until an executor or general administrator is appointed by the court which has jurisdiction to administer the entire estate; but the appointment of such special administrator does not

give such court jurisdiction to issue letters of general administration, or in any way to interfere with the exercise of general jurisdiction by the court of the county where the decedent resided or had his abode. The residence or place of abode of the decedent in the state fixes the jurisdiction of the court for the purpose of granting general letters.—*In re Long's Estate*, 39 Wash. 557, 81 Pac. 1007, 1008. Where a non-resident dies within the state, leaving personal property, the probate court of the county where he died, leaving property therein, has jurisdiction to grant administration upon his estate. The rule, in this country, is universal, that an administration may be granted in any state or territory where unadministered property of a deceased person is found, or real property subject to the claim of any creditor of the deceased, and that probate of the will of any deceased person may be granted in any state where he leaves personal or real property.—*Bliller v. Boswell*, 9 Wyo. 57, 59 Pac. 798, 801. In Oregon the county court has exclusive jurisdiction to grant and revoke letters testamentary and of administration.—*Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456, 460. Until the removal of an administrator already appointed, no new administrator can be appointed. It is not therefore error to refuse letters of administration where there is already a duly appointed and qualified administrator.—*Estate of Keane*, 56 Cal. 407, 409. Where the statute requires the jurisdictional facts to be set forth in the petition, and a petition containing such facts has been filed, the probate court acquires jurisdiction of the matter, notwithstanding the applicant, at the time of filing such petition, has failed to make the affidavit required by the statute concerning the names and places of residence of the heirs of deceased, and that deceased died without a will. It was not the intention of the legislature that the affidavit should contain the facts essential to giving the court jurisdiction of the case. This is clear where the same statute unmistakably provides that the jurisdictional facts shall be set forth in the petition.—*McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123, 1125. The jurisdiction of a probate court, in Kansas, to appoint an administrator, does not depend upon the existence of debts due from the estate, nor upon the evidence of assets which can be legally applied to the payment of such debts.—*Nickel v. Vogel*, 76 Kan. 625, 92 Pac. 1105. It is the duty of the probate court, in the appointment of an administrator, to ascertain and determine whether one who is an applicant therefor is a suitable person to administer the estate, and if it is found that he is not a suitable person, and there is substantial evidence to support the finding, the appellate court will not disturb an order made thereon refusing to appoint such applicant.—*Brown v. Dunlap*, 70 Kan. 663, 79 Pac. 145. Where applications are made in different counties upon conflicting claims as to the fact of residence, the superior court of the county in which a petition is first filed has exclusive jurisdiction to determine the question of residence, and the courts of other counties must abide the determination of that court, which is reviewable only upon appeal; and if

another court assumes to take jurisdiction of the estate, a public administrator, who has made application for letters of administration, and the next of kin of decedent, have such an interest as will entitle them to maintain a writ of prohibition to prevent the exercise of jurisdiction by such last-named court.—*Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767, 769. The power to grant letters of administration upon the estate of a deceased person is purely statutory and intestacy is a necessary prerequisite to the granting of general letters of administration in the state of Washington.—*In re Guye's Estate*, 54 Wash. 264, 103 Pac. 25, 132 Am. St. Rep. 1111.

3. Preliminary proof.—To the granting of general and original administration upon the estate of a deceased person, intestacy is a prerequisite. An allegation of decedent's intestacy should be made in the petition, and the court should have reason to believe the statement true; but, while the statute requires the court to demand proof that decedent died intestate before granting letters of administration, yet it does not require that the court shall find and adjudge in that inquiry that decedent died intestate. The proof of that fact should be by the best known and obtainable evidence at the time, and should negative the proposition that decedent left a will. It should be shown that such proof was made before granting of letters of administration. Yet, while the law requires inquiry to be made as to whether decedent made a will, and makes the right to grant letters of general administration dependent upon the fact that, according to the proof attainable, decedent left no will, it does not require that the court shall solemnly determine by judgment that decedent died intestate, because the statute leaves the question open for the propounding of a will at any time, and the admission of a will to probate, ipso facto, supersedes and vacates the granting of letters of general administration.—*In re Davis' Estate*, 11 Mont. 196, 28 Pac. 645, 648, 649. While proof must be made of intestacy and death, if there is no contest, sworn declarations, made before a notary public of another state, are admissible to prove such facts, even where no commissions issued from the court to take depositions, and no notice was given or interrogatories prepared.—*In re Leiter's Estate*, 19 Mont. 474, 48 Pac. 753, 755, 756. It is the object of the law, that administration shall never be granted until the death of the person, and then only one administration within the state.—*Beckett v. Selover*, 7 Cal. 215, 236, 68 Am. Dec. 237. A decedent whose will is entitled to be admitted to probate does not die intestate, within the meaning of a statute prescribing the order in which letters of administration shall be granted.—*Estate of Barton*, 52 Cal. 538, 540. For the purpose of founding administration, a simple contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where it was found payable.—*McCully v. Cooper*, 114 Cal. 258, 262, 55 Am. St. Rep. 66, 35 L. R. A. 492, 46 Pac. 82. While a claim for damages for death by wrongful act is not a general asset of the estate under the



statutes of Wyoming, it is a sufficient asset of the estate for the purpose of appointing an administrator. Hence a claim for damages for death by wrongful act being, under the statutes of Wyoming, at least a special asset of the estate, the right given by the Wyoming statute to recover damages for death by wrongful act can be enforced in the state of Utah, through the medium of an administrator appointed by the courts of that state. This question has been squarely presented and decided by the courts of the last-named state on the ground that such right of action is transitory.—*Utah Sav. & T. Co. v. Diamond C. & C. Co.*, 26 Utah 299, 73 Pac. 524; *In re Lowham's Estate*, 30 Utah 436, 85 Pac. 445, 446. Where a special administrator has been appointed, issues as to an accounting made by him should be determined before the appointment of the regular administrator.—*French v. Superior Court*, 3 Cal. App. 304, 85 Pac. 133, 134. An administrator can be appointed only on proof of the death of the person whose estate is sought to be administered, and a court not having such proof when making the appointment acts without jurisdiction.—*Estate of Paulsen*, 35 Cal. App. 654, 170 Pac. 855. On application for letters of administration the character of proof necessary to establish the death of the person in respect to whose estate the letters are sought forms an exception to the general rule excluding hearsay.—*In re Paulsen's Estate (Cal.)*, 178 Pac. 143. An affidavit can be used as evidence only in the cases specified by the code in that connection, among which cases is not the proving of death as preliminary to the appointment of an administrator, § 2009, Code. Civ. Proc.—*Estate of Paulsen*, 35 Cal. App. 654, 170 Pac. 855.

#### REFERENCES.

Presumption that person shown to be dead died intestate.—See note 21 Ann. Cas. 231.

4. Letters on estate of minor.—Letters of administration may be granted upon the estate of a minor, as well as upon that of an adult.—*City of Horton v. Trompeter*, 53 Kan. 150, 35 Pac. 1106; *Wheeler v. St. Joseph, etc., R. R. Co.*, 31 Kan. 640, 3 Pac. 297. Thus, where the deceased was eight years of age, and resident of the state owning property of the value of \$2.25 at the time of her death, it was held that, upon proper application by the father of the deceased, the probate court had the right to grant letters of administration.—*City of Horton v. Trompeter*, 53 Kan. 150, 35 Pac. 1106. In section 1368 of the Code of Civil Procedure of California, authorizing letters of administration to be granted to the guardian of "any person entitled," but for his being "a minor or incompetent," the words any persons entitled, etc., have reference to such persons as are, under the terms of sections 1365 and 1369 of the code named, taken together, declared to be so entitled; section 1368 of that code, therefore, disqualifies only on the ground of minority, and that only to the extent that, if the minor has a guardian, the administration goes to the latter.—*Estate of Graff*, 169

Cal. 250, 252, 146 Pac. 657. Section 1368 of the Code of Civil Procedure of California deals only with the bar of minority and removes that. Non-residence still remains as an absolute disqualification affecting alike both the ward and the guardian. The wards were residents, the one of Germany and the other of Belgium; the guardian was that only of the German ward. On appeal the court held that the administration should go to the public administrator.—*Estate of Graff*, 169 Cal. 250, 146 Pac. 657.

#### REFERENCES.

Necessity and priority of administration upon the estate of minors.—See note 7 Am. & Eng. Ann. Cas. 861.

#### 5. Petition for letters.

(1) In general.—An application for letters of administration upon the estate of a decedent must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case. The filing of a proper petition with the clerk of the court constitutes the making of the application. The application necessarily precedes the hearing.—*Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767, 769. In Idaho a proceeding for the appointment of an administrator is an "action."—*Gwinn v. Melvin*, 9 Ida. 202, 108 Am. St. Rep. 119, 2 Ann. Cas. 770, 72 Pac. 961. A co-administrator may be appointed to act with the administratrix with the latter's consent, and the fact that he is misnamed "special administrator" does not vitiate the appointment.—*Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 682, 684. A statute providing that the clerk shall collect from the petitioner for letters of administration or of guardianship certain sums, depending upon the appraised value of the estate, up to a designated amount, beyond which the rate shall be the same without reference to value, is violative of the constitution, and therefore invalid. In such a statute there is a manifest inequality in the rates fixed for estates falling in the different classes.—*Hauser v. Miller*, 37 Mont. 22, 94 Pac. 197, 198. In Washington, where the husband, upon the death of his wife, is the only person interested in community property, and there are no debts, it has been held that he has a right to make a special contract with relation to the payment of a person's services, before agreeing to recommend him for an appointment as administrator.—*In re Field's Estate*, 33 Wash. 63, 73 Pac. 768, 770. Where the decedent left a will, it is clearly proper for the court to postpone the hearing of an application for letters of administration upon his estate, until the validity of the will has been determined in proceedings brought for that purpose.—*Estate of Edwards*, 154 Cal. 91, 97 Pac. 23, 25. A petition for letters of administration upon the estate of a decedent who left a will should be dismissed, where the applicant shows no disposition to wait until the validity of the will has been determined.—*Estate of Edwards*, 154 Cal. 91, 97 Pac. 23, 25.

(2) *Application by creditors.*—The term “creditors,” as used in the statute concerning the respective right to letters of administration, where a person has died intestate, relates only to such as were creditors of the deceased at the time of his death, or to holders of obligations created by the deceased himself. The evident purpose of such a statute is to give to those who are materially interested in the preservation and application of the assets of the estate as creditors an opportunity to administer when the other persons described in the statute do not exist, or for some reason have not sought the appointment as administrator. A creditor for funeral expenses, therefore, is not entitled to letters of administration. Such a claimant is specially protected by statute. His claim is the first that can be paid; and there does not exist the same reason for conferring the right to administer upon such a claimant as that which exists in favor of other creditors.—*In re Sullivan's Estate*, 25 Wash. 430, 65 Pac. 793, 795. If a creditor petitions for the appointment of another person as an administrator of an estate, the petitioner's right to be appointed as a “principal creditor” of the estate is thereby waived in writing. When he asks, in writing, for the appointment of another, he thereby waives his statutory right.—*In re Sullivan's Estate*, 25 Wash. 430, 65 Pac. 793, 796. As between a sixty-thousand-dollar creditor of an estate and other creditors, the claim of each of whom is less in amount than one hundred dollars, the former must be considered a “principal creditor,” and entitled to letters of administration, in preference to the others, though all are of the same degree and rank as creditors.—*In re Sullivan's Estate*, 25 Wash. 430, 65 Pac. 793, 795. The right of a creditor to administer the estate depends upon his supposed interest therein, and, when the status of creditor ceases, his right to administer upon the estate ceases.—*In re Englehart's Estate*, 17 N. M. 299, Ann. Cas. 1915A, 54, 45 L. R. A. (N. S.) 237, 128 Pac. 67. Under the laws of the state of Washington a creditor has no absolute right to administer on the estate of his deceased debtor. The most he has is a privilege exercisable only in the event of the nonaction of persons having the prior right, such persons having the right to nominate a suitable person to act in their stead, subject to confirmation by the court, and a creditor has no right to object to such nomination.—*Larson v. Stewart*, 69 Wash. 223, Ann. Cas. 1914A, 1011, 124 Pac. 384. A person who buys claims against an estate for the purpose of qualifying himself as an administrator acquires no rights thereby to be appointed administrator.—*In re Hoss's Estate*, 59 Wash. 360, 109 Pac. 1071. A creditor is not entitled to letters of administration in preference to the widow of the deceased, upon allegations in his petition that she conspired to murder her husband, it not being pretended that she had been convicted or even charged with such crime.—*Estate of Agoure*, 165 Cal. 427, 132 Pac. 587. In a proceeding to have letters of administration granted at the instance of petitioning creditors of the decedent it is necessary to

make out no more than a *prima facie* showing that the petitioners are creditors.—*Estate of Mumford*, 173 Cal. 511, 160 Pac. 667.

(3) *Construction of statute.*—Under the statute which designates the order in which letters of administration shall be issued, and which prescribes that the relatives of the deceased shall be entitled to administer "only when they are entitled to succeed to his personal estate, or some portion thereof," brothers of the decedent are entitled to administration only when they are entitled to "succeed" to the estate, or some portion thereof, in the sense in which that word is used in the statutes respecting the descent of or succession to property. Thus where they take personal property by devise and bequest under a will, they do not "succeed" to it. The statute contemplates only cases where a person dies intestate, and when a party takes personal property by succession.—*Estate of Wakefield*, 136 Cal. 110, 112, 68 Pac. 499.

(4) *Statement of facts.*—The application for letters of administration must be in writing, signed by the applicant, and must state the facts essential to give the court jurisdiction of the case. Jurisdictional facts are the death and the residence of the deceased.—*Beckett v. Selover*, 7 Cal. 215, 233, 68 Am. Dec. 237; *Estate of Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381. The death of the deceased and his last residence must be alleged in the petition.—*Beckett v. Selover*, 7 Cal. 215, 233, 68 Am. Dec. 237; *Haynes v. Meeks*, 10 Cal. 110, 118, 70 Am. Dec. 703. These are foundational facts, upon which all the subsequent proceedings of the court must rest.—*Haynes v. Meeks*, 10 Cal. 110, 118, 70 Am. Dec. 703. There can be no valid administration upon the estate of a living person.—*Stevenson v. Superior Court*, 62 Cal. 60, 61. It is also necessary for the petition to allege the existence of those matters concerning which no presumption of law can be indulged. There is no presumption that a petitioner for letters of administration is a resident of the state, or that he is of any particular age. As to these matters, it is therefore necessary to allege and prove them. But where the presumptions are in favor of the petitioner, and against the existence of any of the other disqualifications, it is neither necessary to allege matters in aid of such presumptions, nor does the law cast upon the petitioner the burden of proving them.—*Estate of Gordon*, 142 Cal. 125, 131, 75 Pac. 672. The petition for letters of administration need not set forth the fact that there are no other applications for letters pending.—*In re Long's Estate*, 39 Wash. 557, 81 Pac. 1007, 1008. On application for letters of administration, the amount and the value of the estate are not jurisdictional facts.—*Lucas v. Todd*, 28 Cal. 182, 186. The facts essential to the granting of administration of the estate of a deceased are, death of the deceased, his intestacy, and that he left an estate to be administered in the county in which the application for administration is made.—*Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860. Upon an application for letters of administration, the exact date

of the death of the deceased is not essential to the jurisdiction of the probate court, and not necessary for decision upon the application for the appointment of administrators.—*Layne v. Johnson*, 19 Cal. App. 95, 124 Pac. 860. On application for letters of administration, the death of the alleged decedent is a jurisdictional fact.—*In re Paulsen's Estate* (Cal.), 178 Pac. 143.

(5) *Sufficiency of petition.*—An application to procure letters of administration on the estate of a decedent is a pleading, and the rules in regard to admissions in pleading apply to it.—*Duff v. Duff*, 71 Cal. 513, 522, 12 Pac. 570. As the application or petition must state the facts essential to give jurisdiction, it may in some cases be necessary to state that the deceased left property in the county in which the application is made; but it is sufficient that the value and character of the property, when known to the applicant, be stated, where the statute requires no further statement regarding the property. Neither, in such a case, need the real property belonging to or claimed by the estate of a decedent be described in the petition for letters of administration.—*Duff v. Duff*, 71 Cal. 513, 521, 12 Pac. 570. The amount and the value of the estate are not jurisdictional facts.—*Lucas v. Todd*, 28 Cal. 182, 186. No precise form of petition for letters of administration is prescribed by the statute, and though it is always safe to follow the words of the statute literally, yet it is not absolutely necessary, but equivalent words will answer.—*Beckett v. Selover*, 7 Cal. 215, 233, 68 Am. Dec. 237. Thus it is sufficient, in describing the residence of the deceased, to say that he was "late a resident of" a designated county. While this does not follow the exact language of the statute, yet the term "late" seems to be fully as strong as the words of the statute, and, from the connection in which it is found, the evident meaning is that the deceased was last a resident of the county named.—*Beckett v. Selover*, 7 Cal. 215, 233, 68 Am. Dec. 237; and see *Townsend v. Gordon*, 19 Cal. 188, 206. Where a person has not been heard from for many years, and is presumed to be dead, it is sufficient, as to his residence at the time of his disappearance to allege, in a petition for letters of administration, that he was "heretofore a resident of the above-named county and territory," and that he mysteriously disappeared some time during a designated month of a particular year, and more than seven years ago.—*Scott v. McNeal*, 5 Wash. 309, 31 Pac. 873. It is also good practice to state in the petition all facts upon which petitioner relies to entitle him to letters in preference to other persons.—*Lucas v. Todd*, 28 Cal. 182, 186. But, while it is true that a person is not entitled to letters of administration, who comes within any of the disqualifications prescribed by the statute, yet it is only necessary for a petitioner to allege in his petition the existence of matters concerning which no presumption of law is indulged in his favor.—*Estate of Gordon*, 142 Cal. 125, 75 Pac. 672, 674.

(6) *To be granted in what court and county.*—Letters of administration must be issued in the county of last residence; that is, in the

county in which the decedent died.—*Beckett v. Selover*, 7 Cal. 215, 233, 68 Am. Dec. 237. If a petition for letters of administration has been filed in one county, in which the existence of property therein is alleged, the superior court of another county, while such proceeding is pending in the former county, has no right to assume jurisdiction for the purpose of granting letters of administration in the latter county.—*Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767, 769. But the appointment of a special administrator in one county does not preclude the probate court of another county, in which application for general letters of administration is first filed, from taking jurisdiction for the purposes of general administration.—*Estate of Damke*, 133 Cal. 433, 435, 65 Pac. 888. If, under one statute, the public administrator, as to temporary care of the estate, stands ahead of all other classes of persons named in the statute prescribing the order in which administration shall be granted, if the judge chooses to put the estate into his hands, but does not direct the public administrator to take charge of the estate, which he may properly refuse to do, then the public administrator is disposed of in the premises, and the judge must go on to appoint a special administrator other than the public administrator from the classes of persons named in the statute prescribing the order in which administration shall be granted, and may appoint such special administrator from persons other than the public administrator, although the public administrator appears in the list of persons who are entitled, in a certain order, to letters of administration.—*State v. Judge of District Court*, 10 Mont. 401, 25 Pac. 1053, 1055. When the petition for letters of administration is based upon the statutory right to administer, the statute prescribing the order in which letters of administration shall be granted applies, and if the petitioner is not incompetent by reason of some statutory disqualification, the court has no discretion to deny his application. The right of a competent relative is absolute.—*Estate of Li Po Tai*, 108 Cal. 484, 488, 41 Pac. 486, 39 Pac. 30. Shares of the capital stock of a corporation represent the interest of the shareholder in the property of the corporation and the Kansas statute declares that they shall be treated as personal property, but in the absence of legislation fixing the situs of such property for the purpose of administration elsewhere, it must be regarded as at the domicile of the shareholder and the probate court of a county in which the stockholder was not domiciled rightfully refused to appoint an administrator therefor.—*Miller's Estate v. Executrix of Miller's Estate*, 90 Kan. 819, Ann. Cas. 1915B, 699, L. R. A. 1915D, 856, 136 Pac. 257. The appointment by the probate court of a county of the state of Kansas, of an administrator of the estate of one who at the time of his death was an inhabitant and resident of another county thereof, is wholly void, and a release of a mortgage belonging to the estate, executed by one so appointed as administrator under color of an order of such court, is without legal effect.—*Anderson v. Walter*, 78 Kan. 781, 99 Pac. 270. If a person who has a dwelling in one county

and also one in another county, and goes from one to the other, sleeping about one-half the year in each, registers as a voter in the latter county and votes there, and tells his friends that that is his residence, the court in that county is the proper one to issue letters of administration on his estate when he dies.—*Estate of Brady*, 177 Cal. 537, 171 Pac. 303.

(7) *Withdrawal of petition, effect of.*—If a person entitled to administration, files a petition for the appointment of another person, not entitled otherwise than by virtue of such a petition, a withdrawal of the petition before the court acts upon it has the same effect as if no petition had been made; and the person so filing and withdrawing it can not be held to have renounced his own right to have the appointment.—*McCormick v. Brownell*, 25 Ida. 11, 20, 136 Pac. 613.

6. *Order of appointment.*—The California statute which prescribes the order in which administration shall be granted simply designates by classes, generally, who are entitled to administer, and prescribes the preferential order in which the classes are so entitled, but it makes no distinction among members of a class on account of minority. another statute of the state, however, makes minority a general and absolute disqualification in all cases and as to all classes, except so far as it has removed the disability of a minor, and placed him, through his guardian, in the same category as if the minority did not exist. Under such statute, a minor can not serve as an administrator, but his guardian, as his representative, may. Hence, the court may appoint the guardian of a minor brother of the deceased as administrator, whose appointment is desired by two adult brothers, to the exclusion of a third adult brother.—*Estate of Turner*, 143 Cal. 438, 441, 77 Pac. 144. The granting of letters of administration out of the order provided for in the statute is erroneous, but not a nullity.—*Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456, 460. Any other of the "next of kin," in a statute regulating the right to administer upon the estates of deceased persons, "who would be entitled to share in the distribution of the estate," must be construed to mean the next of kin capable of inheriting, or who would be entitled to distribution if there were no nearer kindred.—*Anderson v. Potter*, 5 Cal. 63. Section 1365 of the Code of Civil Procedure of California, prescribing the order in which certain persons are entitled to administer, has been so amended as to apply to the relatives of the previously deceased spouse of decedent, "when entitled to succeed to some portion of the estate." Prior to such amendment, the section applied only to the relatives of the deceased. Under this section, the brothers are fourth in order of precedence, and the next of kin are seventh; and as the amended section applies equally "to the relatives of the previously deceased spouse of the decedent," the order of precedence must necessarily so apply. The order prescribed by the statute must therefore be followed, and this gives the brothers precedence of the next of kin, whether they be

"relatives" of decedent or of the deceased spouse.—*Estate of Hill*, 8 Cal. App. 286, 96 Pac. 918. Where no one falling within any one of the first ten classes of persons who may be appointed administrator of the estate of an intestate makes application therefor, any person in class No. 11 may apply and that class consists of "any person legally competent."—*McCormick v. Brownell*, 25 Ida. 11, 136 Pac. 615. The surviving husband or wife is entitled to general letters of administration to the exclusion of any other person (Rev. Codes of Montana, sec. 7432), unless at least one of the grounds of incompetency enumerated in section 7436 is shown.—*State v. District Court*, 49 Mont. 146, 140 Pac. 733.

7. Who are entitled to letters.—The term "relatives," as used in the statute prescribing the order in which letters of administration shall be granted, is employed in its generic sense, so as to include expressly the husband and wife in the same category with the other relatives therein enumerated; and the right of the widow to letters depends upon the fact whether she is entitled to inherit any of her husband's property; if she is not entitled to succeed to any portion of his estate, neither she nor her nominee is entitled to letters of administration.—*Estate of Davis*, 106 Cal. 453, 455, 39 Pac. 756. A widow is not disqualified to act as an administratrix of her husband's estate from the fact that she does not apply for letters of administration therefor within the time prescribed by statute after the death of her husband. Such a provision is to be construed rather as a rule of evidence than as a positive rule of law, and while the court may appoint others in such a case, yet the widow is not disqualified, and, if appointed, may act.—*Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456, 461. The marriage of a surviving widow does not prevent her from becoming an administratrix. After the death of the husband or wife, the survivor has the right to marry. Such marriage is not within the contravention of any statute, nor is it against public policy. In the absence of a statutory provision, such marriage does not deprive the party so marrying from the right to hold property, administer upon an estate, or to do any other lawful act. If the husband dies, it is true that the survivor is not the wife of deceased. She could not be the wife of her husband after his death. She is his widow, but she was, during his life, his wife, and as his wife she survived him. When the legislature used the words "surviving husband or wife," it intended to designate the survivor of the spouses, and to give survivor the right to administer or to name some person to administer.—*Estate of Dow*, 132 Cal. 309, 310, 64 Pac. 402. Under the present California statute, a married woman may be appointed an executrix or administratrix; and if a married woman is appointed an executrix or administratrix, and afterwards marries, her authority is not extinguished. As to former cases concerning the extinguishment of her authority by marriage, see *Schroeder v. Superior Court*, 70 Cal. 343, 11 Pac. 651; *Estate of Allen*, 78 Cal. 581, 21 Pac. 426; *McMillan v. Hayward*, 94 Cal. 357, 29 Pac. 774; *Cos-*  
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grove v. Pitman, 103 Cal. 268, 37 Pac. 232. A statute which provides that if the person entitled to letters is a minor, letters must be issued to his guardian, or any other person entitled to the letters of administration, in the discretion of the court, applies to minors generally, rather than to a surviving husband or wife under the age of majority, yet old enough to contract the marital relation. As to minors sustaining such marital relationship, the statute giving the right to nominate is special and controls.—*In re Steward's Estate*, 18 Mont. 595, 46 Pac. 806, 807. The brothers of the decedent are entitled to letters of administration only when they are entitled to succeed to the estate, or some portion thereof.—*Estate of Wakefield*, 136 Cal. 110, 112, 68 Pac. 499. The surviving husband or wife is, under section 7432 of the Revised Codes of Montana, entitled to letters of administration to the exclusion of any other person, unless one of the grounds of incompetency enumerated in section 7436 of those codes is shown to exist.—*State (ex rel. Cotter) v. District Court*, 49 Mont. 146, 140 Pac. 732. Under section 1365 of the Code of Civil Procedure of California, specifying the order of preference in granting letters of administration, relatives of the deceased are entitled to administer only when they are entitled to succeed to his personal estate or some portion of it. Such right of succession is a controlling limitation on the right of administration.—*Estate of Crites*, 155 Cal. 392, 101 Pac. 316. Where the executor of the will of a deceased husband was the sole devisee of his estate, and obtained distribution of his estate and afterward died, the widow, who both had an agreement of separation upon supposed equal division of the community property, and had an allowed claim against the husband's estate, may be appointed administratrix of her deceased husband's estate, for the purposes of enabling her to sue for fraud upon her rights as wife and creditor to recover land fraudulently conveyed by her husband to his brother, who became his executor, to defeat her rights as wife and creditor.—*Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. The existence of an interlocutory decree of divorce does not take away the right of the widow to administer the estate of her husband.—*Estate of Martin*, 166 Cal. 399, 137 Pac. 2. A person holding, as assignee, portions of the estate of a deceased person from one who is the sole legatee under the will of the testator is a person interested in the estate, and as such entitled, upon petition, to letters of administration.—*In re Rankins' Estate*, 164 Cal. 138, 127 Pac. 1034. Any person legally competent may be appointed administrator of an estate, if no one falling within the first ten subdivisions of section 5351, Revised Codes of Idaho, shall have applied for appointment.—*McCormick v. Brownell*, 25 Ida. 11, 20, 136 Pac. 613. The right, under the statute whereby the nominee of a surviving mother may be entitled to letters of administration, and to the revocation of prior letters, is not absolute and always available; the pleading must show *prima facie* that the applicant is entitled to the relief sought.—*In re Infelise's*

Estate, 51 Mont. 18, 149 Pac. 365; *Melzner v. Trucano*, 51 Mont. 18, 149 Pac. 365.

**8. Priority. Preference.**—The widow has a paramount right to letters of administration, where her competency is not disputed.—*Estate of Turner*, 142 Cal. 549, 552, 77 Pac. 1099. The surviving widow, though remarried to another man, has a right to letters, superior to that of the son of a decedent.—*Estate of Dow*, 132 Cal. 309, 310, 64 Pac. 402. Where a section of the code places children of the deceased in the list of persons entitled to administer, but another section thereof provides that, of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood, a son is entitled to letters of administration to the exclusion of a daughter; and letters should be directed to be issued to the son alone.—*Estate of Coan*, 132 Cal. 401, 402, 64 Pac. 691. The assignee of the daughter's interest acquires no greater right in the administration than she had.—*Estate of Brundage*, 145 Cal. 538, 75 Pac. 175. A son who parted with all his rights as the heir of his mother, after her death, and before the death of the father, is not entitled to administer upon his mother's estate in preference to his sister.—*Estate of Edson*, 143 Cal. 607, 608, 77 Pac. 451. An adopted illegitimate daughter is entitled to letters of administration as against a nephew.—*Estate of Heaton*, 139 Cal. 237, 73 Pac. 186. A public administrator does not, by virtue of his office, or by filing a petition for letters of administration upon the estate of a decedent, acquire any vested right to letters of administration.—*Estate of McLaughlin*, 103 Cal. 429, 430, 37 Pac. 410. As against the public administrator, the nominee of the father and mother of a deceased person is entitled to letters of administration.—*Estate of Bedell*, 97 Cal. 339, 343, 32 Pac. 323. The public administrator is entitled to letters, in preference to creditors.—*Estate of McKinnon*, 64 Cal. 226, 30 Pac. 437. The public administrator is preferred to one who bases his claim upon the written request of a son of the deceased, who is residing in a foreign country.—*Estate of Beech*, 63 Cal. 458. The public administrator has a better right to letters of administration than the nominee of a married daughter of the intestate.—*Estate of Kelly*, 57 Cal. 81. As against a relative of the deceased, who is not entitled to share in the distribution of his estate, the public administrator has a preferred right to letters of administration.—*Estate of Eggers*, 114 Cal. 464, 466, 46 Pac. 380; and see *Estate of Healy*, 122 Cal. 162, 54 Pac. 736, 66 Pac. 175, 176. As between the public administrator and the nominee of brothers of the decedent, who are not entitled to administer as heirs at law of the deceased, and who are merely devisees of a deceased mother, who is the sole heir at law of a deceased sister, preference in the issuance of letters should be given to the public administrator.—*Estate of Wakefield*, 136 Cal. 110, 112, 68 Pac. 499. Brothers "of the previously deceased spouse of decedent," who are "entitled to succeed to some portion of the estate," are entitled to letters of administration upon decedent's estate, in

preference to the nephews of decedent.—Estate of Hill, 8 Cal App. 286, 96 Pac. 918. The widow has a claim to administer which, unless she has waived it, takes precedence of the claim of all others.—Estate of Lowe, *Lowe v. Lowe*, 178 Cal. 111, 172 Pac. 583. A child of a deceased person who has petitioned for letters of administration must be preferred as against the nominee of two remaining children of the decedent, which nominee is not entitled to succeed to any part of the personal estate of the decedent.—Estate of Myers, 9 Cal. App. 694, 100 Pac. 712. Because he claims to own as his separate property, land believed by the court to be community property, a surviving husband does not forfeit his statutory right to preference in the issuance of letters of administration on his deceased wife's estate, nor can he be compelled to give up such claim as a condition precedent to the granting of letters.—*Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 193. The words "no relatives or next of kin" in the proviso in section 90 of the Probate Act of Washington (Laws 1873, p. 269), as amended by the Laws of 1881, p. 6, section 1, relate to such relatives or next of kin as are mentioned in the enacting clause of the section so that next of kin other than those mentioned have no priority in the right to letters of administration over any suitable person.—*In re Hoss's Estate*, 59 Wash. 360, 109 Pac. 1072. Under section 1365 of the Code of Civil Procedure of California, providing that relatives are entitled to administer only where they succeed to some portion of estate, child taking under will held entitled to preference over widow taking nothing.—*In re Crites's Estate*, 155 Cal. 392, 101 Pac. 816. As between the widow, and one claiming to be a nephew, and another claiming to be an adopted son of the deceased, the widow is entitled to letters of administration.—*Chestnut v. Capey*, 45 Okla. 754, 146 Pac. 589. The wife, on the death of her husband, where they were united by a common law marriage, has the right to administer upon his estate.—Estate of Mattcote, 59 Colo. 566, 151 Pac. 448. A surviving husband or wife is entitled to letters of administration, to the exclusion of any other person, where no ground of incompetency enumerated in the statute is shown.—*State v. District Court*, 49 Mont. 146, 148, 140 Pac. 732. Obviously the three sections, 1365, 1368, and 1369 of the Code of Civil Procedure of California, relating to the right to administer, are to be taken together.—Estate of Graff, 169 Cal. 250, 146 Pac. 657. A sister of the decedent is to be preferred to a niece, in the granting of letters of administration, even though the niece be the first to apply, and though she protest that the sister's application is not made in good faith.—Estate of McCausland, 170 Cal. 134, 137, 148 Pac. 924. In the absence of a showing of incompetency, the person who is entitled to letters testamentary or of administration must be given the preference in the selection of a special administrator.—*State (ex rel. Cotter) v. District Court*, 49 Mont. 146, 140 Pac. 732.

## REFERENCES.

Right of a widow to administer the estate of her deceased husband.  
—See note, 93 Am. Dec. 685.

## 9. Right to nominate. Letters to others than those entitled.

(1) In general.—A surviving husband or wife is always interested in the estate, and, generally, immediately dependent upon it, and the policy of the law plainly is, that he or she shall have the administrative control, if desired. Therefore such person, or his nominee, if a fit person, and not incompetent, has the absolute right to letters of administration. Special provision is made for the appointment of the nominee by the surviving husband or wife, irrespective of whether they are themselves entitled to administration, while in other cases it is only the nominee of one who is himself competent to serve that can be considered.—*Estate of Dorris*, 93 Cal. 611, 613, 29 Pac. 244; *Estate of Bedell*, 97 Cal. 339, 32 Pac. 323. A competent person named by the widow of a deceased person, although she has remarried, is entitled to letters of administration, in preference to a son of the decedent.—*Estate of Dow*, 132 Cal. 309, 64 Pac. 402; see *Estate of Allen*, 78 Cal. 581, 21 Pac. 426. The fact that a surviving husband has been convicted of a felony does not deprive him of his right to nominate a person to act as administrator of his deceased wife's estate.—*McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123, 1124. A surviving wife may nominate a competent person to act as administrator of her deceased husband's estate, though she herself is disqualified by her minority.—*In re Stuart's Estate*, 18 Mont. 595, 46 Pac. 806. The appointment of a surviving widow as administrator of her husband's estate, after notice and hearing, as provided by statute, is conclusive as to the matters therein adjudged, one of which is that the applicant was the surviving wife, and the order of appointment is therefore conclusive as against a subsequent application of another, who claimed that she was also the surviving wife of the intestate.—*Estate of Aldrich*, 147 Cal. 343, 81 Pac. 1011, 1012. After letters of administration have been granted, upon the original application therefor, to a brother of the deceased, the surviving wife, though she has a prior right to have such letters revoked, and to obtain letters of administration for herself, can not confer such right of priority upon a nominee. The right to have letters issued to the nominee is the right of the widow, and not of the nominee.—*Estate of Shiels*, 120 Cal. 347, 349, 52 Pac. 808. The mere fact of requesting the appointment of another does not, however, as a matter of law, estop the surviving spouse from revoking his or her request, and consenting that the estate be administered by the administrator then in office, at any time before the court has acted upon such request.—*Estate of Shiels*, 120 Cal. 347, 348, 52 Pac. 808. In general, there is not the same reason for favoring other persons entitled to administer in certain cases as there is with respect to a surviving husband

or wife. Some of them may not even be interested in the estate. Hence they are only entitled to nominate, when they are the persons entitled to administer, and then the nomination is submitted to the discretion of the court, which may, if there is good reason for so doing, refuse to confirm the nominee, and appoint the person next entitled.—Estate of Dorris, 93 Cal. 611, 613, 29 Pac. 244. The right of persons entitled to administer on an estate to have, upon their written request, letters of administration issued to persons not entitled to administer, exists only where there is a vacancy in the administration.—Estate of Carr, 25 Cal. 585, 586; Estate of Healy, 122 Cal. 162, 54 Pac. 736, 66 Pac. 175, 176. The object of the statute is to allow to those entitled the aid and assistance of others who may be more competent to attend to such business.—Estate of Kirtlan, 16 Cal. 161, 165. In cases other than that of a surviving spouse, it is only the nominee of one who is himself competent to serve as administrator who can be considered.—Estate of Bedell, 97 Cal. 339, 32 Pac. 323. The nominee of the father and mother of a decedent is entitled to letters of administration, in preference to the public administrator. The nominee of any person entitled to administration upon an estate has a preferred right to the administration over a person belonging to any subsequent class mentioned in the statute prescribing the order in which letters of administration shall be granted.—Estate of Bedell, 97 Cal. 339, 341, 32 Pac. 323. Nephews and nieces of the decedent do not have the absolute right of nomination and revocation of letters secured to the first five classes enumerated in the statute prescribing the order in which letters of administration should be granted. The rights of their nominee are secured only by another statute, under which his appointment by the court is discretionary.—Estate of Healy, 122 Cal. 162, 166, 54 Pac. 736, 66 Pac. 175, 176. The surviving husband or wife of a deceased person is entitled to nominate a suitable person for administrator.—In re Stevenson, 72 Cal. 164, 165, 13 Pac. 404; Estate of Cotter, 54 Cal. 215, 217. Where a person entitled to letters of administration does not wish to act, he is entitled to nominate some competent person to do so and to request the court to appoint such person, but such request may be withdrawn and the person making it may thereafter make application that he himself be appointed such administrator.—McCormick v. Brownell, 25 Idaho 11, 136 Pac. 614. It is the policy of the law that the widow shall control in limine the administration of her late husband's estate, and to that end she may either administer it herself or nominate some competent person in whom she places trust and confidence.—In re Blackburn's Estate, 48 Mont. 179, 137 Pac. 381. Where one entitled to do so requests the appointment of a certain person as administrator, such request impliedly authorizes such person to take the necessary steps to secure the removal of any obstacle to the exercise of the right to so nominate, and a request by the proposed administrator in his petition for his own appointment, that a prior administrator be re-

moved was properly incorporated in his petition.—*In re Koller's Estate*, 40 Mont. 137, 105 Pac. 550. The husband or wife, as the case may be, has authority under the statutes of Washington to name an executor for community as well as for separate property and the executor thus named can not be superseded by an administrator appointed at the suggestion of the surviving spouse.—*In re Guye's Estate*, 54 Wash. 264, 103 Pac. 26, 132 Am. St. Rep. 1111. Under the provisions of section 5351, Rev. Stats. of the state of Idaho of 1887, persons falling under subdivisions 4 and 5 thereof are not entitled to nominate a person falling under subdivision 11 and have that person advanced to the rank and class occupied by the person making the nomination.—*In re Daggett's Estate*, 15 Idaho 504, 98 Pac. 849. Under the provisions of section 5351, Rev. Stats. of the state of Idaho of 1887, only persons designated in subdivision 1 thereof are entitled to nominate some other person for the appointment of administrator and thereby have such person advanced to the rank and class of the one making the request or nomination.—*In re Daggett's Estate*, 15 Idaho 504, 98 Pac. 849. When a person entitled to administer upon an estate files a written application under the provisions of section 5365, Rev. Stats. of the state of Idaho of 1887, requesting the appointment of some other competent person, such request and application are addressed to the discretion of the court and the statute is not mandatory upon the court.—*In re Daggett's Estate*, 15 Idaho 504, 98 Pac. 849. Section 5366, Rev. Stats. of the state of Idaho of 1887, must be construed in view of and in connection with sections 5351 and 5365 and, where a number of persons are requesting or petitioning the appointment of strangers or persons falling under subdivision 11 of section 5351, and one only of the persons making such requests falls within the classes of preferred persons under section 5366 and the first five subdivisions of section 5351, such person is entitled to nominate any competent person for administration, and it is the duty of the court to appoint the person so nominated.—*In re Daggett's Estate*, 15 Idaho 504, 98 Pac. 850. The surviving spouse of an intestate is entitled to letters of administration on the estate of the deceased, or to name some competent person to whom letters shall be issued.—*Thomas v. James (Okla.)*, 171 Pac. 855, 859. The widow, whether competent or not, still has her right of nomination.—*In re Blackburn's Estate*, 48 Mont. 179, 195, 137 Pac. 381.

(2) *Non-residents*.—A resident son of the deceased, competent to act as administrator of the estate with the will annexed, is entitled to letters as against the nominee of a non-resident executor and of non-resident children, heirs, and legatees of the deceased person.—*Estate of Brundage*, 141 Cal. 538, 540, 75 Pac. 175. The public administrator has the prior right to letters of administration with the will annexed as against the appointee of a foreign executor, who has renounced his right to letters testamentary, and who is not the surviving husband or wife of the deceased.—*Estate of Garber*, 74 Cal. 338, 16 Pac.

233. Upon the principle that if parties who are entitled to the estate are not in a position to administer it themselves, then the trust should be committed to their nominee, who has their confidence, and whose services are to be paid for from their funds, it is the duty of the court to appoint the nominee of an alien relative, instead of appointing a creditor of the deceased, where such alien relative requested the appointment of a certain person, and no nearer relative makes such application.—*In re Owens' Estate*, 30 Utah 351, 85 Pac. 277, 279. If a non-resident is incapable of administering on an estate, it is not competent for him to nominate an administrator.—*Estate of Muersing*, 103 Cal. 585, 37 Pac. 520. The public administrator is preferred to the nominee of a non-resident heir.—*Estate of Beech*, 63 Cal. 458; *Hutchings v. Clark*, 64 Cal. 228, 30 Pac. 804. A resident of the state, whose appointment as administrator is requested by the brothers and sisters of the deceased, residing in a foreign country, should receive letters of administration, instead of the public administrator.—*In re Watson's Estate*, 31 Mont. 438, 78 Pac. 702, 703. The surviving husband or wife of a deceased person, though incompetent to serve on account of non-residence, is, nevertheless, entitled to nominate a suitable person for administrator. The fact that, by reason of non-residence, a surviving spouse can not act in the capacity of administrator does not deprive him or her of the right to name some one who can.—*Estate of Cotter*, 54 Cal. 215, 217; *Estate of Stevenson*, 72 Cal. 164, 13 Pac. 404; *Estate of Dorris*, 93 Cal. 611, 613, 29 Pac. 244. If the person making the written request is not himself "entitled" to administration, either because incompetent or because another applicant with a better claim is entitled, the nominee can not be considered by the court. Thus a non-resident executor, while entitled to letters testamentary upon application, is not entitled to letters of administration, and his written request therefor is ineffectual for any purpose. So where non-resident children, heirs, and legatees are incompetent, by reason of their non-residence, they are not entitled to letters of administration, and their request to have an administrator appointed is also ineffectual for any purpose.—*Estate of Brundage*, 141 Cal. 538, 75 Pac. 175, 176. The petition of a distributee, who is legally incapable of administering upon the estate, is addressed to the mere discretion of the court, and is of no legal consequence whatever.—*Estate of Morgan*, 53 Cal. 243, 245. A non-resident father, though the next of kin of the decedent, is incompetent to nominate an administrator. Being incompetent himself of administering, it is not competent for him to nominate an administrator.—*Estate of Muersing*, 103 Cal. 583, 37 Pac. 520, 521. Unless a person is a bona fide resident of the state, he is not competent to serve as administrator. He may, however, if incompetent by non-residence only, request the appointment of a resident, and letters may be issued to such resident; but if such resident wishes to take advantage of the statute which provides that no person other than the surviving husband or wife, child,

father, mother, brother, or sister of the intestate may subsequently obtain the revocation of letters, for the reason that he or she is better entitled to them, and seeks to have letters already granted revoked, and himself appointed as administrator, he must make it appear that at least one of the heirs and next of kin who requested him to obtain the revocation of the administrator's letters, and asks letters for himself, is the widow, child, father, mother, brother, or sister of the decedent. If he fails to do this, he does not bring himself within the statute which confers the right to revoke letters already issued, upon the ground that those nominating him are better entitled to administer than is the administrator.—*In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495, 497. A non-resident is not entitled to letters of administration, and is not competent to name the administrator.—*Estate of Wise*, 175 Cal. 196, 165 Pac. 531. Except in the case of a surviving husband or wife, the competent nominee of a relative who is incompetent by reason of non-residence is not entitled to letters of administration, on an original application, by virtue of his nomination by such relatives.—*Estate of Martin*, 163 Cal. 440, 125 Pac. 1055.

10. Letters where several are equally entitled.—If all parties applying for letters of administration are equally qualified and competent, the one who has the prior right, as a matter of statutory construction, is entitled to the appointment.—*In re Nickals' Estate*, 21 Nev. 462, 34 Pac. 250. Thus a brother and a sister of the deceased are not equally entitled to administration, and the son alone should be appointed.—*Estate of Coan*, 132 Cal. 401, 403, 64 Pac. 691. The right to letters of administration of the estate of a decedent given to children is an absolute right vested by the statute in such children and such right can be claimed only in the manner provided by the statute. The court having found that both children were competent, was limited in its discretion to determining which of them should receive the appointment if both were not to be appointed.—*In re Barrett's Estate*, 22 Wyo. 281, 138 Pac. 866, 141 Pac. 95. In case there are, included in the next of kin to an intestate, two brothers equally interested in the estate, but the interest of one of these is antagonistic to, and involved in litigation with, the estate, letters of administration should issue to the other brother regardless of his not having filed an application therefor.—*In re Rouse's Estate*, *Burker v. Rouse* (Okla.), 176 Pac. 954.

11. Discretion of court.—If all the parties applying for letters of administration are equally qualified and competent, the court has no discretion, but must appoint the applicant who, under the statute, has the prior right.—*In re Nickals' Estate*, 21 Nev. 462, 34 Pac. 250, 251; *Estate of Coan*, 132 Cal. 401, 64 Pac. 691; *Estate of McDonald*, 118 Cal. 277, 50 Pac. 399; *Estate of Brundage*, 141 Cal. 538, 75 Pac. 175. Under a statute which provides that "administration may be granted to one or more competent persons, although not otherwise



entitled to the same, at the written request of the person entitled, filed in the court," the court has a discretionary power to grant administration to any competent person who otherwise would not be entitled thereto at the written request of a person who would be so entitled. The only conditions necessary for invoking the discretion of the court are, that there be a written request from some one who, if he applied, would himself be entitled to receive letters of administration, and that the person for whom the request is made be a competent person.—Estate of Bedell, 97 Cal. 339, 342, 32 Pac. 323; Estate of Dorris, 93 Cal. 611, 613, 29 Pac. 244. The court has discretion to appoint the guardian of a minor brother of decedent as administrator, who is a nominee of two adult brothers, to the exclusion of a third adult brother.—Estate of Turner, 143 Cal. 438, 444, 77 Pac. 144. The Nevada statute, providing that letters of administration shall issue to the guardian of a minor instead of the minor himself, refers to the guardian appointed in that state, and not to one appointed in another state.—In re Nickals' Estate, 21 Nev. 462, 34 Pac. 250. A public administrator, by filing a petition for letters of administration upon the estate of a decedent, acquires no such vested right to letters upon the estate as will justify him in interfering with the power of the court to exercise its discretion in granting letters to the guardian of a competent person.—In re McLaughlin, 103 Cal. 429, 431, 37 Pac. 410. An exercise of the court's discretion in refusing to appoint the nominee of nieces and nephews of a decedent, and in appointing the public administrator, who is next entitled, on the ground that it would be for the best interests of the estate that the public administrator shall be appointed, will not be disturbed on appeal, where no abuse of discretion is shown.—Estate of Tealy, 122 Cal. 162, 166, 54 Pac. 736, 66 Pac. 175, 176. The words, "letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court," employed in a statute dealing with the right of a minor to apply, through his guardian, for letters, are construed as limiting the discretion to other persons of the same class to which the minor would belong if he were an adult, and not as conferring discretion to appoint a person of an inferior class in preference to his guardian.—Estate of Turner, 143 Cal. 438, 442, 77 Pac. 144. A recommendation that a party be appointed administrator of an estate is addressed to the mere discretion of the court, and is of no legal consequence whatever, where he is legally incapable of receiving the appointment.—Estate of Morgan, 53 Cal. 243, 245. Although a person may be estopped from making any claim to letters of administration, yet the court has power, upon removing an administrator for neglect, mismanagement, or incompetency, to grant letters to the person so estopped.—Estate of Pico, 56 Cal. 413, 420. The discretion vested in the probate court under section 5365 of the Revised Codes of Idaho, to grant letters of administration, ceases to be a discretion and the duty becomes absolute when the application is made by any of the class, or the nominee

of such person, mentioned in section 5366 of those codes; this construction in no way affects the provisions of section 5363 of such codes, as, under this latter section, the letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves; in other words, the letters must be granted to the applicant, unless the person who has a better right thereto appears and asks for letters, or nominates some one under the provisions of section 5366 of those codes; this construction harmonizes the different sections of the statute with reference to letters of administration.—*Estate of Daggett*, 15 Idaho 504, 513, 98 Pac. 849. Where there is no room for discretion none may be exercised; hence, where the renunciation of her prior right to administer the estate of her late husband had not been fairly procured from the widow, her statutory right had not been exhausted, and it was not within the discretionary power of the court to deny her the exercise of it.—*In re Blackburn's Estate*, 48 Mont. 179, 137 Pac. 381. The probate court has a discretion in the granting of letters of administration, such resting on the inquiry whether it is either necessary, advisable, or desirable to grant them.—*Estate of Daughaday*, 168 Cal. 63, 141 Pac. 929. Although the court will go far in the effort to carry out the expressed will of a testator, it will not endanger the estate nor prevent its proper administration through the granting of letters to an unfit or incompetent person, although nominated in the will as executor.—*Deeble v. Alerton*, 58 Colo. 166, 172, 143 Pac. 1096. Where an equitable claim is the entire estate on which letters of administration are asked for, the court may inquire into the claim to see if it is reasonable, and, on finding that it is not so, deny the petition.—*Estate of Daughaday*, 168 Cal. 63, 141 Pac. 929. If a person, who is entitled to administer upon an estate, files a written application under the Idaho statute and requests the appointment of some other competent person; such application and request are addressed to the discretion of the court; the statute is not mandatory upon the court.—*Estate of Daggett*, 15 Idaho 504, 508, 98 Pac. 849. Insolvency of the estate of a decedent is not a ground for the court's refusal to appoint the surviving spouse as administratrix of an estate; nor is the fact that the estate has become insolvent subsequent to the appointment a ground for her removal.—*In re Dolenty's Estate*, *Mannix v. Dolenty*, 53 Mont. 33, 161 Pac. 524.

12. **Notice and hearing.**—Upon an application for letters of administration, the jurisdictional facts must exist and proper notice be given. A failure to give notice of hearing of the petition for letters of administration is fatal to the jurisdiction of the court.—*Beckett v. Selover*, 7 Cal. 215, 237, 68 Am. Dec. 237. But it is not necessary to give any other notice of the application than that prescribed by the statute.—*Estate of Griffith*, 84 Cal. 107, 109, 23 Pac. 528, 24 Pac. 381. Where the law merely requires that a certain notice shall be posted,

the posting of such notice is sufficient. Thus if a public administrator of one county applies for letters of administration, it is not necessary to send notice to the public administrator of any other county.—*Estate of Griffith*, 84 Cal. 107, 109, 23 Pac. 528, 24 Pac. 381. A petition and notice, and a finding that due notice of the hearing had been posted in three public places, as required by the statute, is sufficient to give the probate court jurisdiction, although it was not shown where such notices were posted.—*Scott v. McNeal*, 5 Wash. 309, 34 Am. St. Rep. 863, 31 Pac. 873, 874. A notice of the hearing of a petition for letters of administration, posted on July 12th, and giving notice of the hearing on July 22nd, is sufficient as a ten-day notice, under the statute.—*Bates v. Howard*, 105 Cal. 173, 182, 38 Pac. 715. If a widow files a petition for letters of administration, and it and other petitions for letters have been set for hearing on a certain date, and the widow subsequently files an amended petition, but which states no jurisdictional fact, and the widow consents to the hearing, a court may, where all contesting parties are in court, hear all the petitions at the time fixed.—*Estate of Turner*, 142 Cal. 549, 553, 77 Pac. 1099. Under a statute which authorizes the precise manner of giving notice, and prescribing a longer notice than ten days, the court does not acquire any jurisdiction, where it was required that the notice of an application for the appointment of an administrator be published in two issues of a newspaper for a period of at least a week prior to September 28th, and by mailing a copy of the notice to the heirs, and the notice was first published on September 20th, and the second and last insertion was on September 27th, being the date prior to the time set for the hearing, and no notice was mailed. This is not a compliance nor a substantial compliance with the order of the court directing the "precise manner" in which the notice should be given. The order providing that the publication should be for a period of at least one week prior to the hearing was not complied with.—*In re Bunting's Estate*, 30 Utah 251, 84 Pac. 109, 111. It is a well-established rule of law that the domicile or permanent residence of a minor is the same as that of a parent, and, upon an application for letters of administration, the presumption is, that the minor children and heirs of a deceased person were residents of the place of decedent's residence at the time of his death.—*In re Bunting's Estate*, 30 Utah 251, 84 Pac. 109, 111. If an application or petition has been made to a court for the appointment of an administrator, the court to which the petition or application is presented must assume jurisdiction thereof, through its designated officer, the clerk of the court, by appointing a time "for the hearing of the application" and giving the prescribed notice.—*Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767, 769. When the notice for the appointment of an administrator has been given, the effect thereof is to bring all the parties who had or acquired any interest in the estate into court and that not only for the one purpose of appointing the admin-

istrator but also that the court will in due time deal with the property of the deceased and will dispose of and distribute it to those who may be entitled to it.—*Barrette v. Whitney*, 36 Utah 574, 37 L. R. A. (N. S.) 368, 106 Pac. 526. The giving of the statutory notice is necessary to give the court jurisdiction to appoint an administrator; it is not necessary to give any other notice, or take any other procedure than that prescribed by the statute; but the essential requirements of the statute must be complied with to give the court jurisdiction over the subject-matter, and to proceed to a judgment that will finally conclude the rights of interested heirs.—*Carter v. Frahm*, 31 S. D. 379, 141 N. W. 370. Where the county court issues an order that a petition for the appointment of an administrator be heard on a day designated, and that due notice thereof be given by publishing a copy of said order for 3 successive weeks, once in each week, such order is not substantially complied with by a publication in either a weekly or a daily newspaper for 10 successive days; it is only the authorized publication that will confer jurisdiction as against heirs not appearing; any other is no legal notice at all.—*Carter v. Frahm*, 31 S. D. 379, 396, 141 N. W. 370.

### 13. Contest of application.

(1) *In general*.—There is a distinction between proceedings in contests against the probate of wills and an application for letters of administration. In the former case the contestant is the plaintiff and the petitioner is the defendant; but on an application for letters of administration the grounds of opposition to the petition are nothing more than an answer, to which no replication is required.—*Estate of Wooten*, 56 Cal. 322, 325. It is not necessary that the contestant of a petition for letters of administration shall be competent to assert the right to administer himself, or that he be entitled to nominate the appointee.—*Estate of Graves*, 8 Cal. App. 254, 96 Pac. 792. In a contest for letters of administration, the question as to whether a person is a bona fide resident of the state or not, is a mixed question of law and fact, to be determined by the court.—*Estate of Wied*, 120 Cal. 634, 638, 53 Pac. 30. Under a constitutional provision that the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy, parties who petition for letters of administration are not entitled to a jury trial, as such a petition is not a "case at law," as that term is understood and construed by the courts.—*In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681, 684. For various questions of evidence in proceedings for the appointment of an administrator, see *In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681, 111 N. W. 540.

### REFERENCES.

Power of court to appoint co-administrator against consent of persons entitled to administration.—See note 4 Am. & Eng. Ann. Cas. 550.

(2) What questions are involved.—Questions of heirship and degree of kinship are necessarily involved in every contest between relatives for letters of administration, and if, in such contests, the trial court erroneously holds that the particular facts are relevant and pertinent to the main inquiry, either as a matter of pleading or proof, such ruling amounts to no more than to a mere error reviewable and correctable through the ordinary remedy of appeal. Hence, upon rival applications for letters of administration, a writ of prohibition will not lie to prevent a court, which has acquired jurisdiction, from admitting evidence as to such questions.—*Johnston v. Superior Court*, 4 Cal. App. 90, 87 Pac. 211, 212. The granting of letters of administration on the estate of a deceased man, to a woman who subsequently, in proceedings to establish heirship in his estate, claimed to be his surviving wife, is not an adjudication of her status as his widow when it does not appear that she based her claim to letters on the ground that she was his surviving wife, or that any such issue was ever tendered to the court for determination.—*Estate of Hancock*, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58.

(3) Who may appear and contest.—On the application of a nephew for letters of administration, persons entitled to be preferred may appear and contest the application, or assert their own rights on that ground.—*Lucas v. Todd*, 28 Cal. 182, 186. The objection that one could not have been legally appointed administrator for the reason that forty days had not elapsed since the decedent's death, during which period a preference right is given to certain heirs and next of kin, can not be raised by one who does not claim to belong to any of the classes for whom such preference right is given.—*In re Long's Estate*, 39 Wash. 557, 81 Pac. 1007, 1008. In a contest between the public administrator and a creditor of an estate as to which shall administer, the court has discretionary power to appoint the public administrator, if his appointment is requested by the other creditors.—*Estate of Doak*, 46 Cal. 573, 574. In a contest for letters of administration, the public administrator is a "person interested," and may appear and contest the appointment of another petitioner. Any one asserting a right to administer may appear in such a contest. This is a different "interest" from that which is contemplated in the statute concerning contests of wills.—*Estate of Healy*, 122 Cal. 162, 163, 54 Pac. 736, 66 Pac. 175, 176. But a public administrator, who has been illegally appointed in one county, is not a party in interest entitled to oppose the appointment of an administrator in another county, in which jurisdiction has already attached. He is not himself an applicant for letters in the latter county, but is merely opposing any action by the court. In such a case he is not himself seeking an appointment, and is not, therefore, affected by the grant of letters of administration to any one else.—*Estate of Davis*, 149 Cal. 485, 87 Pac. 17, 18. The disappearance of a husband for three years prior to his wife's death is not sufficiently long to raise a presumption of his death and the

wife's sister, in order to have a standing as a contestant of the wife's will, must show that the husband was either dead or divorced.—*In re Sieb's Estate*, 70 Wash. 374, Ann. Cas. 1913E, 125, 126 Pac. 914. A creditor of a deceased person can not contest the widow's priority of right to letters of administration, merely by charging her with having entered into a conspiracy to murder her husband, and by innuendo and insinuation implying that his death was the outcome of this conspiracy.—*Estate of Agoure*, 165 Cal. 427, 132 Pac. 587. One who is not within the line of succession, can be appointed to administer upon the estate of an intestate only on application of the person entitled; and, by revoking the application, this person may prevent the appointment, if not actually made at the time.—*McCormick v. Brownell*, 25 Ida. 11, 20, 136 Pac. 613.

(4) **Allegations. Proof. Presumption.**—One who contests the competency of a petitioner for letters of administration must allege and prove facts showing that petitioner is incompetent to act. All that the petitioner is required to show, in order to establish his right to letters, is, that he is an heir at law. On showing that he is a resident, and of the age of majority, in addition to his right, his competency is established. As to these matters the law raises no presumption, and they must be established by proof; but as to the existence of any other matters which might disqualify the petitioner, the law does raise a presumption, in his favor, of their non-existence. Hence, any person who contests the petitioner's right on the ground of the incompetency of the applicant must allege his grounds of incompetency, and necessarily the burden of proof is upon him to establish his allegations in that respect. A finding of the court, in a contest for the issuance of letters of administration, as to matters which are outside of the issues, such as improvidence, lack of capacity, or understanding of the petitioner, is unwarranted.—*Estate of Gordon*, 142 Cal. 125, 132, 75 Pac. 672. In a contest for letters of administration, it is the duty of the court to ascertain and determine which of the two parties petitioning is entitled to letters of administration, and, as such, it has power, and it is its duty, to decide and pass upon all questions necessary to be decided in order to reach a proper conclusion upon the ultimate issue to be determined.—*Estate of Warner*, 6 Cal. App. 361, 92 Pac. 191, 193. A controversy, arising out of rival petitions for letters of administration, between a widow who filed such a petition for her own appointment and her son and daughter, who had previously filed such a petition for the appointment of themselves, and with it the written request of their mother that it be granted, a finding by the court that such applicants had gone to expense and trouble on the faith of the widow's request, estops the widow where the evidence shows that the widow changed her mind without good reason.—*Estate of Lowe*, *Lowe v. Lowe*, 178 Cal. 111, 172 Pac. 583, 584.

14. **Waiver of right. Delay.**—The right to letters of administration, as well as any other right, may be waived in favor of a competent per-

son, and where such waiver has been made, the party making it is estopped from afterwards withdrawing his assent and waiver, or renunciation.—Estate of Kirtlan, 16 Cal. 161, 165; Estate of Keane, 56 Cal. 407, 409; but a surviving widow of the deceased is not estopped from revoking her request to have another appointed, and consenting to the continuance in office of an acting administrator at any time before the court has acted upon her request.—Estate of Shiels, 120 Cal. 347, 348, 52 Pac. 808. Where a person is entitled to letters of administration, a written request by him for the appointment of a nominee is a waiver and relinquishment of his right to administration in favor of the nominee, and is not rendered ineffective by his subsequent request for the appointment of the public administrator. Having once waived and relinquished his right to administration in favor of another, the court is not required to pay attention to the subsequent request.—Estate of Bedell, 97 Cal. 339, 343, 32 Pac. 323. Under statutes giving to certain persons the preference right to letters of administration, and limiting the time within which such preferred persons may apply, it is generally held that such preference is lost by failure to apply within the time fixed by the statute.—Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828, 832; McLean v. Roller, 33 Wash. 166, 73 Pac. 1123; In re Sutton's Estate, 31 Wash. 340, 71 Pac. 1012. Thus the preference to letters testamentary, given to persons named as executors in the will, is forfeited by their failure to apply for the probate of the will, or for letters testamentary within the time fixed by the statute.—Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828, 832. They are not rendered incompetent by the delay, but simply lose their preference right; and unless they come into the state within a reasonable time, and submit themselves to the jurisdiction of the court, and personally conduct the settlement of the estate, the court, in its discretion, may appoint any other competent person to act.—Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828, 832. So where the nominee of a surviving husband fails to present his application for letters of administration until after the expiration of forty days from the intestate's death, his laches is a waiver of the appointee's right, and the court may appoint any suitable person, in its discretion, to administer the estate.—McLean v. Roller, 33 Wash. 166, 73 Pac. 1123, 1124; and the same is true where a husband neglected, for nearly three years after the death of his wife, to petition for his appointment as administrator of her estate.—In re Sutton's Estate, 31 Wash. 340, 71 Pac. 1012. A creditor waives his right to administer upon the estate of his deceased debtor, where he has no other interest in the estate than that of creditor, by agreeing to wait for payment for a few weeks, at the expiration of which time the heirs are to pay his bills.—In re Farnham's Estate, 41 Wash. 570, 84 Pac. 602, 603. Under the statute of Idaho, if application for administration of the estate of an intestate is not made within four years from the date the applicant's right accrues to make such application, the statute of limitations is a bar to such appointment, if properly pleaded

in the proceeding for such appointment.—*Gwinn v. Melvin*, 9 Ida. 202, 108 Am. St. Rep. 119, 2 Ann. Cas. 770, 72 Pac. 961, 962. Under the provisions of the statutes of Kansas, a creditor of decedent, having a claim which he wishes to establish against the estate, may, if the widow or next of kin refuse to take out letters of administration, obtain letters for himself or for other persons after fifty days from the death of decedent; and he can not, without any good cause or reason therefor, defer making such application until the statute of limitations has run, and then claim that during all of the time from the death of the debtor to the appointment of the administrator the statute of limitations is suspended on account of the non-appointment of such administrator. If a creditor would save his claim against the estate of a decedent from the bar of the statute, he must exercise reasonable diligence, if the widow or next of kin refuse to take out letters of administration, to obtain letters of administration for himself or some other person.—*Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051, 1052. A person may be held to a waiver of a prior right to letters of administration, even though the elements of an estoppel in pais do not appear (decided in a case where a widow requested that letters on her husband's estate be granted to her son and daughter, and then, before action on the request, petitioned for letters to herself).—*Estate of Lowe*, *Lowe v. Lowe*, 178 Cal. 111, 172 Pac. 583. A wife is barred from asserting after her husband's death in order that she might obtain letters of administration on his estate, his breach of an ante-nuptial agreement between them whereby she relinquished all claim in his estate in consideration of his support and education of her daughter during the daughter's minority and the payment of \$100 per annum to the wife, where she for ten years succeeding the breach of the covenant to support and educate the daughter and up to the time of her husband's death continued to receive and accept the annual payment of the \$100.—*Estate of Warner*, 167 Cal. 686, 140 Pac. 583. Where a son and daughter of the decedent file a petition for letters of administration, and this is accompanied by a request in writing by the widow that it be granted, if, before the hearing, the widow petitions that her request be disregarded and that letters be granted to herself, the giving or not giving weight to the waiver is a matter within the court's discretion.—*Estate of Lowe*, *Lowe v. Lowe*, 178 Cal. 111, 172 Pac. 583. The failure of a surviving spouse and next of kin, in their order, to apply for letters of administration within forty days after decedent's death constitutes a waiver of the right, after which the court has discretionary power to appoint any suitable person.—*Koloff v. Chicago M. & P. S. Ry. Co.*, 71 Wash. 543, 129 Pac. 400. Under the provisions of the statutes of Idaho the nominee of a non-resident brother of the deceased, being competent, will be appointed administrator in preference to a creditor who has been guilty of delay in making his application and did not make same until after that of the brother's nominee.—*Wright v. Merrill*, 26 Ida. 8, 140 Pac. 1102. A



person entitled to administration, as a right by virtue of statute, must apply for appointment within a reasonable time, in order that he may not lose the right.—*Wright v. Merrill*, 26 Ida. 8, 14, 140 Pac. 1101. The prior right conferred by section 7432 of Revised Codes of Montana upon those most interested in an intestate's estate to administer it may be waived; and if waived in favor of another, the renunciation, if fairly procured and freely made, is irrevocable.—*In re Blackburn's Estate*, 48 Mont. 179, 137 Pac. 381. If a widow's renunciation of her prior right to administer is fairly procured and freely given, she has exercised her prior right, and no longer has any to assert; but it is otherwise if such renunciation was not so procured and given.—*In re Blackburn's Estate*, 48 Mont. 179, 194, 137 Pac. 381. The waiver of a statutory right may be effected not only by express words but also by conduct; and such waiver is apparent where the person entitled refuses to claim the right, or waits an unreasonable time before claiming it.—*In re Infelise's Estate*, 51 Mont. 18, 149 Pac. 365; *Melzner v. Trucano*, 51 Mont. 18, 149 Pac. 365. The primary purpose of the statute is to confer a prior right of administration upon those most interested in an intestate's estate; to signify the legislative will concerning the order of priority; to provide a method by which it may be once asserted in every case; and to authorize its assertion by nomination in certain instances; but the right is for the benefit of the persons named and may be waived; and the effect of its waiver is the same as the effect of a waiver in other cases.—*In re Blackburn's Estate*, 48 Mont. 179, 187, 137 Pac. 381. The preference right of the surviving husband or wife, under the Montana statute, may be waived.—*In re Infelise's Estate*, 51 Mont. 18, 149 Pac. 365; *Melzner v. Trucano*, 51 Mont. 18, 149 Pac. 365. Facts considered and held that a common law marriage existed between deceased and plaintiff in error at the time of the death of deceased, and that the plaintiff in error as surviving wife was entitled to waive her right to be appointed administratrix of the estate of deceased, and was entitled to name a competent person to act in such capacity.—*Thomas v. James (Okla.)*, 171 Pac. 855, 859. If, within a reasonable time after the death of an intestate, some person entitled to be appointed as administrator does not present himself for appointment, upon application, letters will be granted to some other person.—*Wright v. Merrill*, 26 Ida. 8, 14, 140 Pac. 1101.

15. *Validity of appointment and letters.*—There can not be two administrations on the same estate, in the same state, at the same time. Hence, the appointment of a new administrator while another one is in office is a nullity.—*Haynes v. Meeks*, 20 Cal. 288; *Estate of Hamilton*, 34 Cal. 464. The existence of an administrator in one county precludes the appointment of an administrator of the same estate in another county.—*Oh Chow v. Brockway*, 21 Or. 440, 28 Pac. 384; *Estate of Griffith*, 84 Cal. 107, 23 Pac. 528. Jurisdiction to appoint a special administrator over the estate does not empower the court to

appoint a general administrator.—Estate of Damke, 133 Cal. 430, 432, 65 Pac. 889. Letters of administration granted to a minor are not void, nor will the removal of the administratrix from the state operate, ipso facto, as a revocation of the letters. Neither the fact of minority nor of her removal will constitute a defense in an action prosecuted by her as administratrix.—Missouri, etc., Ry. Co. v. McWherter, 59 Kan. 345, 53 Pac. 135. Where a brother of decedent has been appointed administrator of his estate, but afterwards becomes insane, and is sent to the asylum, such fact does not create an entire vacancy in the administration of the estate. The administrator becomes incapable of executing the trust for the time being, and if, during that time, the widow of a deceased petitions for letters, she would doubtless receive them; but when the incapacity of the administrator is removed by a certificate of discharge from the asylum, and he has again entered upon the discharge of his duties as administrator, and has been recognized by the court and others, the petition of the widow for letters comes too late.—Estate of Moore, 68 Cal. 281, 284, 9 Pac. 164. Although the probate court does not have jurisdiction to set aside an order discharging an administrator after the lapse of the term in which the order was entered, yet a petition to administer upon unadministered assets of the estate gives the court jurisdiction to order an administration and distribution of the same.—Otero v. Otero, 11 Ariz. 260, 90 Pac. 601, 603. If letters of administration are issued in one county, and application for them is also made in another county, the court of the latter county should hold the proceedings before it in abeyance until the question of conflict of jurisdiction between them is settled by the judgment of the court which first acquired jurisdiction over the administration of the estate.—Estate of Damke, 133 Cal. 430, 65 Pac. 889; Dungan v. Superior Court, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767. Between courts of co-equal authority, that one which first obtains jurisdiction will be permitted to pursue it to the end, to the exclusion of all others, and it will not permit its jurisdiction to be impaired or subverted by a resort to some other tribunal.—Ewing v. Mallison, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369, 370. The appointment of an administrator, though erroneous, is not necessarily void.—In re Owen's Estate, 32 Utah 469, 91 Pac. 283, 285. The order of a court appointing an administrator, which order recites that proof of notice was made, though in fact it was made without the mailing of notice to the executor named in the will, as required by statute, is merely voidable, and will be presumed valid until set aside in a direct proceeding for that purpose.—Rice v. Tilton, 14 Wyo. 101, 82 Pac. 577, 579. If a blank form is used in petitioning for letters of administration, but a blank space is left where the name of the decedent should be, in the allegation as to his death, such omission is not fatal, where the meaning of the petition is apparent from other parts thereof.—Magoon v. Ami, 8 Haw. 191, 193. Where the statute authorizes the grant of administration to one or more of several classes of persons,

and an administratrix is duly appointed, and an administrator executes a bond and takes the prescribed oath of office as such administrator, and is recognized throughout the proceedings as one of the administrators of the estate, the acts of the administratrix, as such, are good in any event, and the fact that the administrator acted with her, though no petition for his appointment may have been filed and no notice given, could not have the effect of rendering her acts, as such administratrix, without jurisdiction.—*Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250, 254. Letters of administration which are dated and issued by the clerk on Christmas day are not void.—*Glendenning v. McNutt*, 1 Ida. 592.

#### REFERENCES.

Letters of administration are void for want of jurisdiction when.—See note 33 Am. Dec. 239-243. Appointment of administrator de bonis non after final settlement of estate.—See note 5 Am. & Eng. Ann. Cas. 497. Effect of misnaming estate in granting letters.—See note 46 L. R. A. (N. S.) 274.

16. Collateral attack.—The action of a probate court in appointing an administrator and issuing letters of administration is judicial in its nature, and is not open to collateral attack, unless the court acted without jurisdiction.—*Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369. When letters of administration are issued, such letters will be held to be prima facie evidence of all facts necessary for the validity of such letters. Letters of administration can be attacked collaterally only when the probate court, for some reason, has no jurisdiction to make the appointment.—*Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369, 371. Every presumption not upset by the record itself, is to be indulged in support of the regularity and validity of the order appointing an administrator. This presumption of regularity applies alike to the orders and decrees of the probate courts, as well as to proceedings of courts of general jurisdiction.—*McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240. It is clear that an order granting letters of special administration can not be held void in a collateral proceeding because it does not show the removal, suspension, or resignation of the prior administrator. In addition to the general presumption of regularity attaching to the orders of the court, the statute expressly dispenses with the necessity of a showing of facts essential to jurisdiction by recital in the order or decree. And, in the absence of a showing to the contrary, it must be presumed that the facts existed authorizing the court to appoint the special administrator.—*Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 682, 685. A decree appointing an administrator is a judicial determination of that matter, subject only to be reversed, set aside, or modified on appeal, and can not be collaterally attacked on the ground that he did not give a bond in twice the value of the personal property of the estate, as required by the statute.—*Abrook v. Ellis*, 6 Cal. App. 451, 92 Pac. 396, 398. Neither can the authority of an administrator be attacked in a col-

lateral proceeding because his oath was not taken until after the letters were issued, and was then taken before a notary public, particularly where the statutory oath was taken before the proper officer prior to trial.—*Gallagher v. Holland*, 20 Nev. 164, 18 Pac. 834, 835. Nor can the validity of his appointment be attacked collaterally because of irregular service of the notice of the hearing of the application for letters.—*Chilton v. Union Pac. Ry. Co.*, 8 Utah 47, 29 Pac. 963. In a collateral attack upon the appointment of an administrator, it may be presumed that a petition was in fact filed and notice given, where it does not affirmatively appear that no petition for the appointment was filed and that no notice was given.—*Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250, 254. It is generally held that an order by the proper court granting letters testamentary or of administration without the statutory notice will not make the order void ab initio, but that such defect is an irregularity merely, for which the letters may be revoked; and the order is not subject to collateral attack.—*Rice v. Tilton*, 14 Wyo. 101, 82 Pac. 577, 579. The general rule is, that, as between courts of concurrent and co-ordinate jurisdiction, the court that first obtains possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court.—*Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369, 371. The determination of a court as to the residence of the deceased in the county where the application is made, although it may be erroneous, is immune against a collateral attack.—*Estate of Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381. But the place of residence, like the question of death, or the existence of an estate to be administered, is a jurisdictional fact, and it is not concluded by the decision of the court that such fact does exist, but it may be inquired into in a proper collateral proceeding for the purpose of showing want of jurisdiction in the court making the determination.—*Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369, 372. Of course, where there is a want of jurisdiction, the appointment of an administrator of an estate is subject to collateral attack. The probate court of a county has no jurisdiction over the estate of a deceased resident to appoint an executor or administrator, unless the deceased was, at the time of his death, an inhabitant or resident of the county in which the appointment was made. Jurisdiction vests in the probate court of the county of the residence of the deceased at the time of his death.—*Ewing v. Mallison*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369, 373. The appointment of an administrator is not open to collateral attack merely because the appointee is not next of kin to the deceased whose estate is being administered.—*Hanson v. Sward*, 92 Kan. 1, 140 Pac. 100. Where the probate court has jurisdiction of the person and the subject-matter, the regularity of the appointment of an executor and his right to act can not be attacked in a collateral proceeding.—*Smith v. Steen*, 20 N. M. 436, 150 Pac. 927, 928.

## REFERENCES.

Collateral impeachability of findings as to jurisdictional facts on which administration of a decedent's estate is founded.—See note 18 L. R. A. 242-244. Collateral attack on decree granting letters testamentary or of administration.—See note 4 Am. & Eng. Ann. Cas. 1117.

17. Order granting letters. Effect of.—Immediately upon the issuance of letters of administration, the administrator is entitled to have the possession of the estate of deceased, to the end that the rents and profits, and if need be, the proceeds of the property itself, be applied to the payment of debts and charges, and the balance, if any, distributed, and by him delivered to the parties entitled. The grant of letters by the probate court is conclusive upon other courts as to the necessity of administration.—Page v. Tucker, 54 Cal. 121, 123. An order appointing an administrator, based upon a petition which states jurisdictional facts, is an adjudication that such facts existed.—Estate of Griffith, 84 Cal. 107, 109, 23 Pac. 528, 24 Pac. 381. Letters of administration are prima facie proof of the death of decedent.—Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068, 1069. A surety on an executor's bond is estopped to deny the order appointing the executor, where the bond contains a recital that by an order of the probate court, duly made and entered, the person named as executor was appointed executor.—Moore v. Earl, 91 Cal. 632, 27 Pac. 1087, 1088. Where a proper petition was presented to the court for the appointment of a specified person as administrator and such person was appointed but failed to qualify, the jurisdiction thus obtained by the court was sufficient to authorize the appointment of any person whom the court might deem competent and suitable, without any formal application by the person so appointed, or formal renunciation by the person who failed to qualify.—Wilkie v. Bailey, 74 Wash. 241, 133 Pac. 388. As a general rule all acts by an executor or administrator done in the due and legal course of administration are valid and binding, even though the appointment is voidable and the letters are afterward revoked, or the incumbent discharged from his office.—Amberson v. Caudler, 17 N. M. 455, 130 Pac. 255. An order appointing administrators is conclusive only between the parties and their privies in respect of the matter directly adjudged, and these matters could only be those things necessary and essential in conferring jurisdiction and establishing the authority of the court to make the order.—Layne v. Johnson, 19 Cal. App. 95, 124 Pac. 860. By issuing letters on an estate that consists only of an equitable claim or demand, a court does not adjudicate on the merits of the claim.—Estate of Daughaday, 168 Cal. 63, 141 Pac. 929. If a person, who has become, for value, assignee of a mortgage on the property of another, is made, on the death of the latter, administrator of the estate, his conduct, no matter how many fraudulent acts, as administrator, he may commit, does not divest him of his contractual rights under the mortgage.—Guisti v. Guisti, 41 Nev. 349, 171 Pac. 161, 164.

## REFERENCES.

Validation of acts of executor de son tort by subsequent grant to him of letters of administration.—See note 5 Am. & Eng. Ann. Cas. 58.

18. Vesting of appointee with office.—The order for the appointment of an administrator, the qualification of the appointee, and the issuing of letters to him, are all necessary proceedings to invest such appointee with the office of administrator.—*Pryor v. Downey*, 50 Cal. 388, 399, 19 Am. Rep. 656; *Estate of Hamilton*, 34 Cal. 464, 469. In an action against an administrator, the presumption is, after verdict, that the administrator qualified immediately upon receiving his letters.—*Aiken v. Coolidge*, 12 Or. 244, 6 Pac. 712, 714. No person can fill the position of administrator, except after due appointment and qualification. No recognition by the probate court could make one an administrator de facto. The order for the appointment, the qualification of the appointee, and the issuance of letters to him, are all necessary proceedings to vest such appointee with the office of administrator.—*Pryor v. Downey*, 50 Cal. 388, 399, 19 Am. Rep. 656. An administrator would have to establish his official character, if denied, by the production of his letters with the oath of office administered, or of his certified copy of the record thereof, which the statute requires to be made.—*Estate of Hamilton*, 34 Cal. 464, 469. An executor is without power to act as such until he has given bond as required by statute, unless bond shall have been waived in the will.—*Amberson v. Caudler*, 17 N. M. 455, 130 Pac. 255.

19. Who are not entitled to appointment.—A public administrator, by filing his petition for letters of administration, does not acquire any interest in the estate, nor any right to fees to be thereafter earned. Nor does the fact that expenses incurred by him in advancing certain sums of money for filing the petition and redeeming lands from a tax sale entitle him to the appointment.—*State v. Woody*, 20 Mont. 413, 51 Pac. 975, 976. Under a statute which entitles a creditor to letters, if none of the relatives of a deceased person apply therefor, an officer of a corporation, which is a creditor of the decedent, is not a creditor, and is entitled to the appointment.—*In re Owens' Estate*, 30 Utah 351, 85 Pac. 277, 278, 280. A daughter of a deceased person is not entitled to letters of administration as against her brother.—*Estate of Brundage*, 141 Cal. 538, 543, 75 Pac. 175; *Estate of Coan*, 132 Cal. 401, 64 Pac. 691. So an illegitimate child is not entitled to administer on the estate of his father, as against the father's brother.—*Estate of Pico*, 52 Cal. 84, 85. The appointee of the guardian of a minor heir is not entitled to letters of administration.—*Estate of Woods*, 97 Cal. 428, 429, 32 Pac. 516. A son, who has conveyed all his interest in the estate of his deceased mother, is not entitled to administer upon her estate, in preference to his sister.—*Estate of Edson*, 143 Cal. 607, 77 Pac. 451. An illegitimate son of the deceased is not entitled to letters of administration on his estate, as against a brother of the decedent.—*Estate of Pico*, 52 Cal. 84, 85. If a wife dies, leaving a surviving husband, who

is entitled to the whole estate, her nephew, who is not entitled to any portion thereof, is not entitled to letters of administration thereon.—*In re Carmody*, 88 Cal. 616, 620, 26 Pac. 373. A person is not entitled to be appointed as the administrator of an estate by reason of the fact that he advanced money for filing a petition for letters and redeeming lands from a tax sale. An applicant is not entitled to letters because of the fact that he has paid out his own money in an unsuccessful attempt to attain them.—*State v. Woody*, 20 Mont. 413, 51 Pac. 975, 976. A surviving partner, where the partnership existed at the time of the death of the intestate, is precluded from acting as administrator of the estate of such intestate.—*Cornell v. Gallagher*, 16 Cal. 367, 368. So a person who was at one time in partnership with the testator is ineligible to be appointed administrator of the estate, where it appears that there were unsettled matters growing out of the relation at the time of the death of the decedent.—*In re Garber*, 74 Cal. 338, 340, 16 Pac. 233. Under existing laws in the state of North Dakota a foreign corporation is incompetent to receive letters of administration issued by the courts of that state.—*Gunrow v. Simonitsch*, 21 N. D. 281. When husband and wife execute an amicable agreement with no purpose in mind of separating or instituting divorce proceedings, but to the end rather that during their joint lives each shall be independent of the other financially; and the agreement recites, among other things, "and the said parties hereby release each to the other all claim for support, or any claim against the other's estate that he or she might have or assert, now or in the future," on the husband's death the widow is not entitled to administer, as against a daughter of his by a former wife.—*Estate of Walker*, 169 Cal. 400, 146 Pac. 868. Under section 1365 of the Code of Civil Procedure of California a widow is not entitled to administer on her husband's estate, if she is without any right to succeed to his personal property.—*Estate of Walker*, 169 Cal. 400, 146 Pac. 868. Where there is a will but no nomination thereby of an executor, the husband of the testatrix is not necessarily entitled to administer under section 1365 of the Code of Civil Procedure of California if the will does not entitle him to any part of the personal estate.—*Estate of Cook*, 173 Cal. 465, 160 Pac. 553.

## 20. Competency. Disqualification to act.

(1) *In general.*—A surviving husband, or wife, child, father, mother, or brother, is "competent" to obtain letters of administration as against another person to whom letters have been granted, if not addicted to drunkenness, imprudence, or want of integrity or understanding.—*Estate of Pacheco*, 23 Cal. 476, 480. The mere fact that an applicant for letters of administration is not next of kin to the deceased does not incapacitate him from holding the office of administrator. On the contrary, a stranger is legally competent, though others are entitled to priority.—*Estate of Kirtlan*, 16 Cal. 161, 165. The applicant for letters of administration is not disqualified by the fact that he is a

public administrator, and is a creditor of or has a demand against the estate. The statute which requires that the public administrator shall not be interested in the expenditures of any estate "he administers" does not state a rule of disqualification.—Estate of Muersing, 103 Cal. 585, 586, 37 Pac. 520. One holding an adverse claim to the estate of a deceased person is not by statute disqualified to act as administrator. The statute prescribes the grounds of disqualification, and the courts have no right to add to the disqualification prescribed by the legislature.—Estate of Brundage, 141 Cal. 538, 540, 75 Pac. 175; Estate of Muersing, 103 Cal. 585, 37 Pac. 520. While it is true that a person, who comes within any of the disqualifications prescribed by statute, is not entitled to letters of administration, yet it is necessary for a petitioner to allege in his petition the existence of those matters only concerning which no presumption of law is indulged in his favor. Where such presumption exists, it is neither necessary to allege matters in aid of such presumption, nor does the law cast upon the petitioner the burden of proving them. If no issue is tendered to the proceeding as to improvidence, lack of capacity, or understanding of the petitioner, a finding of the court upon these matters is outside of the issues and must be disregarded.—Estate of Gordon, 142 Cal. 125, 131, 133, 75 Pac. 672. As to what extent the disqualification of a person by reason of his minority has been removed by the California statute, see Estate of Turner, 143 Cal. 438, 441, 77 Pac. 144. The minor's disability has been removed at least to the extent of conferring the right on his guardian to be appointed administrator.—Estate of Turner, 143 Cal. 438, 441, 77 Pac. 144. A brother's prejudice against his sister does not disqualify him from acting as administrator.—Estate of Bauquier, 88 Cal. 478, 26 Pac. 373. Section 1369 of the Code of Civil Procedure of California prescribes the grounds of disqualification for appointment as administrator and the courts have no right to add to the disqualifications so prescribed.—Estate of Brundage, 141 Cal. 538, 75 Pac. 175; *In re Banquier*, 88 Cal. 302, 26 Pac. 178, 532; *In re Carmody*, 88 Cal. 616, 26 Pac. 373; Estate of McCausland, 170 Cal. 134, 136, 148 Pac. 924. A person having been surety for an administrator, who has been removed, is not, by force of the suretyship alone, disqualified from appointment as administrator of the same estate; such fact affords no basis for the presumption that he will squander the estate or fail to administer it properly.—*In re Marks' Estate*, 81 Or. 632, 639, 160 Pac. 540, 542. An interlocutory decree of divorce does not deprive a husband of his prior right to letters of administration on the estate of his deceased wife; and the entry of the final decree does not operate retroactively to deprive husband of rights of inheritance.—Estate of Sellar, 164 Cal. 181, Ann. Cas. 1914B, 1093, 128 Pac. 324. The existence of an interlocutory decree does not deprive the widow of the right to administer on her husband's estate.—Estate of Martin, 166 Cal. 399, 137 Pac. 2.

(2) *Want of understanding*.—The fact that an applicant for letters of administration is of great age, and can not read nor write, and can not



speaking English, does not show any want of "understanding," within the meaning of a statute which makes one incompetent to execute the duties of the trust by reason of "drunkenness, improvidence, or want of integrity or understanding." This misfortune may render it difficult for him to perform some of his duties properly, but it does not render it impossible.—*Estate of Pacheco*, 23 Cal. 476, 480. Proof that the applicant can not speak the English language, and is not familiar with the constitution of the state, does not show a lack of "understanding," particularly where the other evidence shows that he is a man of great intelligence and education.—*Estate of Li Po Tai*, 108 Cal. 484, 489, 41 Pac. 486, 39 Pac. 30. Nor is the applicant disqualified by want of "understanding," where there is nothing to denote any lack of understanding on his part, but, on the contrary, he is charged with an alleged design to defraud certain heirs of rightful shares of the estate, and that he entered into an alleged conspiracy with others to carry out that fraudulent purpose.—*Root v. Davis*, 10 Mont. 228, sub nom.—*In re Davis' Estate*, 25 Pac. 105, 107.

(3) **Drunkenness.**—The applicant is not incompetent by reason of alleged drunkenness, where the testimony as to his habit of using intoxicating liquors is to the effect that his use of the same is temperate. However reprehensible that habit may be, as regarded from a moral point of view, it is not within the province of the court to deny letters of administration to an applicant on the ground of mere use of intoxicants. The drunkenness contemplated by the statute undoubtedly is excessive, inveterate, and continued use of intoxicants to such an extent as to render the subject of the habit an unsafe agent to intrust with the care of property or the transaction of business.—*Root v. Davis*, 10 Mont. 228, sub nom.—*In re Davis' Estate*, 25 Pac. 105, 106.

(4) **Improvidence.**—Nor is the applicant for letters of administration disqualified by reason of "improvidence," where there is no evidence to show that he possesses, or has exhibited in reference to property, the characteristics which constitute improvidence, such as carelessness, indifference, prodigality, wastefulness, or negligence in reference to the care, management, and preservation of property in charge; and particularly where the evidence, on the contrary, does show that he has been engaged extensively in business; that he has been intrusted with the custody, care, and expenditure of large sums of moneys, and the superintendence of undertakings of importance, involving large expenses; and that in none of these matters is it shown that he was wanting in foresight, care, and diligence in the management and preservation of the property committed to his charge.—*Root v. Davis*, 10 Mont. 228, sub nom.—*In re Davis' Estate*, 25 Pac. 105, 107.

(5) **Want of integrity.**—The rights of a widow to letters of administration of the estate of her deceased husband can not be questioned on the ground that during the life of her husband she was unfaithful to her marital vows. Evidence that she was an unfaithful wife does

not prove her "lack of integrity," within the meaning of the statute.—Estate of Newman, 124 Cal. 688, 693, 57 Pac. 686, 45 L. R. A. 780. Neither is the applicant disqualified by reason of "want of integrity," on the ground that he has committed perjury, where the facts do not show that he has committed such a crime. Nor does the fact that the applicant's son has a claim adverse to the interest of the heirs of the estate disqualify the applicant from taking the office of administrator, on the theory that the father would be likely to favor his son's claim. This fact has no bearing upon the applicant's integrity. A man of the utmost upright character and of the strictest integrity, and free from all disqualifying conditions prescribed in the statute, may have a son who claims an interest adverse to other claimants of an estate. It would be clearly unlawful to set aside the father's right to letters of administration upon such a pretense as that.—Root v. Davis, 10 Mont. 228, sub nom.—In re Davis' Estate, 25 Pac. 105, 114. An applicant for letters of administration is not wanting in integrity because of a charge that he has entered into a conspiracy with others to carry out a design to defraud certain heirs of rightful shares of the estate, where no conspiracy is shown.—Root v. Davis, 10 Mont. 228, sub nom.—In re Davis' Estate, 25 Pac. 105, 114. The phrase "want of integrity," as used in the statute, means soundness of moral principle and character, as shown by a person's dealings with others, in the making and performance of contracts, and in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others. The fact that an applicant for letters of administration claims property as his own, which the other legatees insist belongs to the estate, does not, of itself, and without some reference to the honesty of the claim, show a want of integrity.—Estate of Bauquier, 88 Cal. 302, 307, 26 Pac. 178, 532. The fact that a husband claims the entire estate of his deceased wife as his own, where she died without issue, or direct or collateral kindred, does not show a want of integrity, or disqualification to act as administrator.—In re Carmody, 88 Cal. 616, 620, 26 Pac. 373. A daughter of the decedent in applying for letters of administration on her mother's estate, does not show "want of integrity" disqualifying her as administratrix by introducing in evidence, in the assertion of her right to administer as against one who claims to be her mother's surviving husband, a decree of divorce against him rendered within a year prior to his marriage with the mother, the decree showing that the divorce was on the ground of his adultery with the mother.—Estate of Elliott, 165 Cal. 339, 132 Pac. 439.

(6) Competency of widow or of her nominee.—No condition or limitation is imposed upon the widow's choice of an administrator, except that the nominee be competent; and the fact that she asserts claim to property which the other heirs contend belong to the estate does not render her or her nominee incompetent.—In re Blackburn's Estate, 48 Mont. 179, 188, 137 Pac. 381.

(7) **Right of incompetent to nominate.**—A person primarily entitled to administer an estate, but rendered incompetent by a want of understanding or integrity, is not thereby deprived of the right to nominate some one to act in his stead.—*In re Blackburn's Estate*, 48 Mont. 179, 137 Pac. 381.

21. **Non-residents.**—No person is competent or entitled to serve as administrator or administratrix who is not a bona fide resident of the state.—*Estate of Cotter*, 54 Cal. 215, 217; *Estate of Beech*, 63 Cal. 458; *Hutchings v. Clark*, 64 Cal. 228, 30 Pac. 804. A non-resident surviving husband or wife of a deceased person is incompetent to serve as the administrator of the decedent's estate.—*In re Stevenson*, 72 Cal. 164, 165, 13 Pac. 404; *Estate of Cotter*, 54 Cal. 215, 217. But a non-resident surviving husband or wife of a deceased person is entitled to nominate a suitable person for administrator.—*Estate of Cotter*, 54 Cal. 215, 218. A non-resident father of the decedent is incompetent to serve as administrator, or to nominate one.—*Estate of Muersing*, 103 Cal. 585, 587, 37 Pac. 520. One who is not competent or entitled to serve as administrator, by reason of non-residence, has no power to nominate an administrator, and the court is bound to disregard his request for the appointment of another.—*Estate of Muersing*, 103 Cal. 585, 587, 37 Pac. 520; *State v. Woody*, 20 Mont. 413, 51 Pac. 975, 976. The fact, however, that the person who administered upon an estate was a non-resident is not such a fraud as will avoid the administration proceedings. That a person applying for letters is a non-resident is good ground for opposing his appointment, and good ground for removing him after he has been appointed. But his acts as administrator, when once appointed, are neither void nor voidable, and can not be set aside for that reason. This is so, even where the acts are attacked during the progress of the administration, and, for a much stronger reason, it is not ground for setting them aside on collateral attack after the administration has been closed.—*Melkle v. Cloquet*, 44 Wash. 513, 87 Pac. 841, 843. Upon the application of a widow for letters of administration on her husband's estate, the question as to whether she is a resident of this state depends upon her intention to remain here, and the fact of such residence, notwithstanding that she came to this state because her husband left an estate, and that if he had not left such an estate she would not have come. If, being here, it is her intention to remain here, and make this her future home, she thereby becomes a resident of this state.—*Estate of Newman*, 124 Cal. 688, 693, 45 L. R. A. 780, 57 Pac. 686. Under section 1369 of the Code of Civil Procedure of California, a non-resident of that state is neither competent nor entitled to serve as administrator of the estate of a deceased person.—*Estate of Martin*, 163 Cal. 440, 125 Pac. 1055. A special or a general administrator of another state can not demand judicial recognition in the state of Kansas to recover damages for the death of one who resided in and whose death took place in Kansas.—*Metrakos v. Kansas City M. & G. Ry. Co.*, 91 Kan. 342, 137 Pac. 954. Whether a

person appointed administrator of an estate is a resident of the state is a question of fact to be determined by the court appointing him, and its judgment can not be impeached collaterally.—*Livermore v. Ayres*, 86 Kan. 50, 119 Pac. 549. Since a non-resident is by statute debarred from serving as an administrator, a person is not entitled to the office simply because of having the recommendation of one who, but for non-residence, would himself be entitled.—*Wright v. Merrill*, 26 Ida. 8, 140 Pac. 1101. A petition for letters of administration, which recites as its grounds that the petitioner is heir at law of the decedent and a resident of a named city and county of California, is properly refused on its appearing that such petitioner is a resident of a foreign country.—*Estate of Funkenstein*, 170 Cal. 594, 150 Pac. 987. The latter sentence of section 5365 of the Revised Codes of Idaho, must necessarily be inoperative so long as the first sentence of section 5355 of those codes remains unrepealed, as that sentence declares that no person, who is not a bona fide resident of the state, is competent to serve as an administrator.—*Wright v. Merrill*, 26 Ida. 8, 13, 140 Pac. 1101. The fact that a person, otherwise entitled to appointment as administrator, is a non-resident does not deprive such person of his statutory right to name another for the place.—*In re Infelise's Estate*, 51 Mont. 18, 149 Pac. 365; *Melzner v. Trucano*, 51 Mont. 18, 149 Pac. 365. If a decedent's mother, residing in a foreign country, makes a written request for the appointment of a designated person as administrator of her son's estate in this state, and the same is entitled in the court and cause and addressed to the judge of the court, and is accompanied by an affidavit as to the identity of the party making the request, executed before an officer authorized to administer oaths outside of the United States, such request virtually constitutes a pleading, and, as the request and affidavit are a part of the record in the case, and thus before the court, it is unnecessary to formally offer them in evidence.—*In re Koller's Estate*, 40 Mont. 137, 143, 105 Pac. 549. In the absence of any direct prohibition of a non-resident acting as administrator, letters of administration may issue to him, in a proper case, in the state of Nevada.—*In re Bailey's Estate*, 31 Nev. 377, Ann. Cas. 1912A, 743, 103 Pac. 234.

## REFERENCES.

Right of non-resident to act as executor or administrator.—See notes 113 Am. St. Rep. 562-565, 1 L. R. A. (N. S.) 341-348. Foreign letters of administration.—See note 9 L. R. A. 244-251. Right of alien or non-resident to act as executor or administrator.—See note 3 Am. & Eng. Ann. Cas. 988.

22. Appeal.—One who has the right to contest the issuance of letters of administration to another has the right to appeal from the decree entered against him.—*Estate of Damke*, 133 Cal. 433, 65 Pac. 888; *Estate of Coan*, 132 Cal. 401, 403, 64 Pac. 691. An appeal from an order made upon a motion for a new trial in probate matters will be entertained. Thus where the respondents filed a written opposition to the

Appointment of the appellant as executrix, pleading that she was incompetent to receive the appointment, and she filed a written answer thereto, denying the facts alleging her incompetency, this presented issues of fact, which the court was authorized to re-examine upon motion for a new trial; and its order upon such motion is appealable.—Estate of Bauquier, 88 Cal. 302, 315, 26 Pac. 178, 532. An order, or that part of it vacating an order appointing an administrator, is appealable.—Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066. No appeal lies from an order appointing a special administrator.—Estate of Carpenter, 73 Cal. 202, 14 Pac. 677. A defective notice of appeal from an order appointing an administrator, which has been treated as sufficient throughout the proceedings, and acted upon, can not be objected to for the first time in the appellate court.—Estate of Damke, 133 Cal. 433, 65 Pac. 888. A court in which the petition for letters of administration is first filed has exclusive jurisdiction to determine the question as to the residence of the decedent, and courts of other counties must abide the determination of that court, which is reviewable only upon appeal; and the court, upon appeal, will not review the conclusions of the trial court as to facts essential to its jurisdiction, concerning which such court was vested with the power to hear and determine, at the instance of a party who appeared in that court in the action or proceeding, and has omitted there in any way to urge his objection, but proceeded therein upon the theory that the court had jurisdiction.—Estate of Latour, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441. After the appellate court dismisses an appeal from an order refusing to grant letters of administration, it has no power to appoint an administrator. Its jurisdiction is appellate only.—Territory v. Mix, 1 Ariz. 52, 25 Pac. 528, 529. An appeal lies from an order granting or denying letters of administration; and either a public administrator or non-resident heirs may take such an appeal, as they are "persons interested."—Estate of Graves, 8 Cal. App. 254, 96 Pac. 792, 793. Though an application for letters of administration is defective, it will be assumed, in the absence of any showing to the prejudice of letters to others, that the application was amended to correspond with the proof which established all of the facts necessary.—In re Long's Estate, 39 Wash. 557, 81 Pac. 1007, 1008. The judgment of the court upon appeal from an order refusing to appoint a nominee of nephews or nieces, and in appointing the public administrator, who is next entitled, will not be disturbed on appeal, where no abuse of discretion is shown.—Estate of Healy, 122 Cal. 162, 165, 54 Pac. 736, 66 Pac. 175, 176. The judgment of the supreme court as to a probate matter, as well as other matters, becomes the law of the case unless conditions on which it was founded are so changed as to render its enforcement impracticable.—Estate of Pacheco, 29 Cal. 224. A notice appealing from all orders made by a probate court on a certain day covers any appealable order made on said day.—Estate of Pacheco, 29 Cal. 224, 226. A judgment of the supreme court, that two persons are entitled to be appointed to admin-

ister upon an estate, should be carried into effect, though one of them dies before the probate court acts on the matter.—Estate of Pacheco, 29 Cal. 224, 226, 23 Cal. 476, 481. As to consolidation, on appeal, of proceedings for the appointment of an administrator, see *In re McClellan's Estate*, 20 S. D. 498, 107 N. W. 681. If an administrator is appointed by a county court in Oklahoma, a party in interest though not a party to the proceeding, but who is entitled to be heard therein, is entitled to appeal to the district court, by complying with the statute, in making affidavit, giving notice of appeal, and tendering a solvent bond with sureties, the sufficiency of which bond is unobjectionable.—*Thompson v. State*, 54 Okla. 647, 154 Pac. 508. A party has the same right to appeal from a judgment or final order of the district court in probate matters as in civil actions—that is by proceeding in error—unless as to a particular matter he is deprived of that right by some express provision of the statute.—*In re Barrett's Estate*, 22 Wyo. 281, 138 Pac. 865, 141 Pac. 97. Under the statutes of this state a written notice of appeal by a third person not shown to be interested in the estate by affidavit, is insufficient to confer jurisdiction upon the district court to hear an appeal from the county court on a question of the appointment of an administrator.—*In re Barnett's Estate*, 50 Okla. 1, 3, 150 Pac. 692. On a contest between a widow and the son of a deceased person as to the right to act as administrator of his estate, in which the son bases his claim of prior right of administration upon an ante-nuptial agreement between the deceased and the widow, wherein she relinquished her rights of succession in consideration of certain contracts to be performed by him, a decision of the district court of appeals, on a prior appeal, construing the ante-nuptial agreement, and holding that the widow might still claim her rights as heir, upon showing the failure of her husband to perform material covenants on his part, becomes the law of the case and binding on a subsequent appeal.—*Estate of Warner*, 158 Cal. 441, 111 Pac. 352. Where an appeal was taken from an order denying the appellant's motion for a new trial in the matter of his application for a letter of administration upon the estate of one Annie Nelson, the application was contested by C. O. Nelson and Annie Reardon, the matter was duly tried, findings made and filed, and the order denying said petition entered, the correct title to the cases would be: "In the Matter of the Estate of Annie Nelson, Deceased."—*O'Brien v. Nelson*, 164 Cal. 573, 129 Pac. 985. Upon appeal from an order granting letters of administration to one of two rival applicants, upon the hearing of which the appellant was nonsuited upon his opening statement, the order will not be reversed merely to allow the appellant to offer evidence not admissible to control the effect of the case made by the respondent, regardless of the question whether the granting of a nonsuit upon a contest for letters is proper or admissible practice or not. The case will be treated as if evidence had been offered and properly excluded.—*Estate of McNeill*, 155 Cal. 333, 100 Pac. 1086. Under the provisions of the statutes of the

state of Wyoming an order of the probate court granting letters of administration is reviewable on a writ of error.—*In re Barrett's Estate*, 22 Wyo. 281, 138 Pac. 865, 141 Pac. 97. A bond executed by a third person not shown to be interested in the estate in an attempt to appeal from an order appointing an administrator of an estate from the county court to the district court, is held to be insufficient under the statutes to confer jurisdiction upon such district court, the bond not being signed by such third person as principal, and not being signed by at least two sufficient sureties approved by the judge.—*In re Barnett's Estate*, 50 Okla. 1, 3, 150 Pac. 692. An appeal from an order denying a petition for administering on the estate of a deceased person will be dismissed when the order is in favor of the person appealing.—*Estate of Funkenstein*, 170 Cal. 594, 150 Pac. 987.

## CHAPTER V.

### REVOCATION OF LETTERS, AND PROCEEDINGS THEREFOR.

- § 267. Revocation of letters of administration.
- § 268. Form. Petition for revocation of letters of administration in favor of one having a prior right.
- § 269. Form. Notice of hearing of petition to revoke letters, and for letters of administration to issue to one having a prior right, and to show cause.
- § 270. When petition filed, citation to issue.
- § 271. Form. Citation to show cause why letters of administration should not be revoked, and relative be appointed instead.
- § 272. Hearing of petition for revocation.
- § 273. Form. Order revoking letters of administration, and appointing a person having a prior right.
- § 274. Prior rights of relatives entitle them to revoke prior letters.

#### REVOCATION OF LETTERS.

- |  |                                     |
|--|-------------------------------------|
| 1. Petition for revocation.              | 6. Who may obtain.                  |
| 2. Province of court.                    | 7. Who can not obtain.              |
| 3. Statutory priority.                   | 8. Letters may be revoked when.     |
| 4. Appointment is valid until set aside. | 9. Burden of proof.                 |
| 5. What operates as a revocation.        | 10. Letters not to be revoked when. |
|  | 11. Appeal.                         |

#### § 267. Revocation of letters of administration.

When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him.—*Kerr's Cyc. Code Civ. Proc.*, § 1383.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 802.

Hawaii—Revised Laws of 1915, section 2272.

Idaho\*—Compiled Statutes of 1919, section 7502.

Montana\*—Revised Codes of 1907, section 7447.

Probate Law—40



Nevada—Revised Laws of 1912, section 5906.  
 New Mexico—Statutes of 1915, sections 2240, 2241, 2244.  
 North Dakota—Compiled Laws of 1913, section 8665.  
 Oklahoma—Revised Laws of 1910, section 6258.  
 South Dakota—Compiled Laws of 1913, section 5720.  
 Utah—Compiled Laws of 1907, section 3837.  
 Washington—Laws of 1917, chapter 156, page 661, section 74.  
 Wyoming\*—Compiled Statutes of 1910, section 5520.

§ 268. Form. Petition for revocation of letters of administration in favor of one having a prior right.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
 [Title of form.]

To the Honorable the —<sup>2</sup> Court of the County <sup>3</sup> of —, State of —.

Now comes —, of the county <sup>4</sup> of —, state of —, and respectfully presents this his petition, showing:

That — died on or about the — day of —, 19—, in the said county <sup>5</sup> of —, state of —;

That said —, at the time of his death, was a resident of the said county <sup>6</sup> and state, and left estate in said county <sup>7</sup> and state, consisting of real and personal property;

That the character and probable value of said real property are as follows, to wit, —;<sup>8</sup> and that the character and probable value of said personal property are as follows, to wit, —;<sup>9</sup>

That the heirs at law of said deceased are as follows, to wit:<sup>10</sup>

Names.

Relationship.

—  
 —

—  
 —

That on the — day of —, 19—, this court made an order, which was duly entered, appointing —, a creditor <sup>11</sup> of decedent, as administrator of the estate of said deceased; that, in pursuance of said order, letters of administration were issued to the said —, as such administrator; that said — duly qualified and received said

letters, and thereupon assumed the duties of such administrator, and is now administering said estate;

That your petitioner is the surviving husband <sup>12</sup> of said deceased, is competent, and has a right to letters of administration prior to that of said —, who has been appointed administrator as aforesaid.<sup>13</sup>

Your petitioner therefore prays that the letters of administration heretofore issued to the said — be revoked, and that letters of administration upon the estate of said —, deceased, be issued to your petitioner.

—, Attorney for Petitioner. —, Petitioner.

**Explanatory notes.**—1 Give file number. 2 Give title of court. 3-7 Or, City and County. 8, 9 State whether separate or community property, and give description, location of property, and probable value. 10 Give names and relationship. 11 Or as the case may be. 12 Or, wife, child, father, mother, brother, or sister. 13 Or, that the surviving husband, or wife, child, father, mother, brother, or sister of the intestate, according to the fact, has requested, in writing, that your petitioner, a competent person, petition for the revocation of said letters, and pray for the issuance of letters to him, the said —.

**§ 269. Form. Notice of hearing of petition to revoke letters, and for letters of administration to issue to one having a prior right, and to show cause.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

—, a relative <sup>2</sup> of —, deceased, having filed in this court a petition praying that letters of administration upon the estate of —, deceased, heretofore issued to —, be revoked, and that such letters be issued to petitioner, who claims a prior right thereto, —

Notice is hereby given that the matter will be heard on —,<sup>3</sup> the — day of —, 19—, at the court-room of said court,<sup>4</sup> in the county <sup>5</sup> of —, state of —, at — o'clock in the forenoon <sup>6</sup> of that day, and all persons interested in said estate are notified to appear then and

there, and show cause, if any they can, why petitioner's prayer should not be granted.

—, Clerk of the — Court.  
By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 State what relative. 3 Day of week. 4 Give number of department, if any. 5 Or, city and county. 6 Or, afternoon.

**§ 270. When petition filed, citation to issue.**

When such petition is filed, the clerk must, in addition to the notice provided in section thirteen hundred and seventy-three, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing.—*Kerr's Cyc. Code Civ. Proc.*, § 1384.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 803.

Idaho—Compiled Statutes of 1919, section 7503.

Montana\*—Revised Codes of 1907, section 7448.

Nevada—Revised Laws of 1912, section 5907.

Oklahoma—Revised Laws of 1910, section 6259.

South Dakota\*—Compiled Laws of 1913, section 5721.

Utah—Compiled Laws of 1907, section 3837.

Wyoming—Compiled Statutes of 1910, section 5521.

**§ 271. Form. Citation to show cause why letters of administration should not be revoked, and relative be appointed instead.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

The People of the State of —.

To — Administrator of the Estate of —, Deceased,  
Greeting.

By order of this court, you, the said —, administrator of the estate of —, deceased, are hereby cited to appear before the —<sup>2</sup> court of the county<sup>3</sup> of —, state of —, at the court-room thereof,<sup>4</sup> on —,<sup>5</sup> the — day of —, 19—, at — o'clock in the forenoon<sup>6</sup> of said day, and show cause, if any you can, why your

letters of administration should not be revoked, and —, a relative of the said deceased, be appointed as such administrator in your stead.

In testimony whereof, I, —, clerk of the —<sup>7</sup> court aforesaid, have hereunto set my hand and affixed the seal of said court this — day of —, 19—.

[Seal] —, Clerk of the — Court.  
By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Give title of court. 3 Or, city and county. 4 Give number of department, if any, and location of court-room. 5 Day of week. 6 Or, in the afternoon. 7 Give title of court.

§ 272. Hearing of petition for revocation.

At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.—*Kerr's Cyc. Code Civ. Proc.*, § 1385.

ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 804.

Idaho\*—Compiled Statutes of 1919, section 7504.

Montana\*—Revised Codes of 1907, section 7449.

Nevada—Revised Laws of 1912, section 5907.

Oklahoma\*—Revised Laws of 1910, section 6260.

South Dakota\*—Compiled Laws of 1913, section 5722.

Utah—Compiled Laws of 1907, section 3837.

Washington—Laws of 1917, chapter 156, page 661, section 75.

Wyoming\*—Compiled Statutes of 1910, section 5522.

§ 273. Form. Order revoking letters of administration, and appointing a person having a prior right.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

It being shown to the court that — has heretofore been appointed administrator of the estate of —, deceased; that letters of administration have been issued to

the said —, and that he is now the duly qualified and acting administrator of said estate, but that on the — day of —, 19—, —, the surviving husband <sup>2</sup> of said decedent, filed a petition in this court, asking that the letters of administration issued to the said — be revoked, and that letters be issued to the said — by reason of his relationship and prior right to letters of administration; and it appearing that notice of such application for the revocation of letters of administration and of application for letters of administration was duly given; that a citation to —, the said administrator, to appear and answer the said petition at the time and place appointed for the hearing has been served and returned as provided by law and by the direction of this court; and the matter now coming on regularly to be heard,<sup>3</sup> the court proceeds to hear the allegations and proofs of the parties, and finds that the said petitioner, —, is the husband <sup>4</sup> of said decedent, and by reason of such relationship has a right to letters of administration prior to that of the said —, the administrator aforesaid, —

It is therefore ordered and adjudged, That the letters of administration heretofore issued to the said —, as administrator of the estate of —, deceased, be, and they are hereby, revoked, and that letters of administration upon said estate be issued to —, the said petitioner, upon his taking the oath required by law, and filing a bond in the sum of — dollars (\$—) with sureties to be approved by the judge of this court.

Dated —, 19—. —, Judge of — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, wife, child, father, mother, brother, or sister of the intestate, according to the fact. <sup>3</sup> Or, if the matter has been continued, say, "and the matter having been continued by order of the court to this date." <sup>4</sup> Or, wife, etc., as the fact may be.

**§ 274. Prior rights of relatives entitle them to revoke prior letters**

The surviving husband or wife, when letters of administration have been granted to a child, father, brother, or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.—*Kerr's Cyc. Code Civ. Proc.*, § 1386.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Arizona—Revised Statutes of 1913, paragraph 805.
- Idaho\*—Compiled Statutes of 1919, section 7505.
- Montana\*—Revised Codes of 1907, section 7450.
- Nevada—Revised Laws of 1912, section 5908.
- North Dakota—Compiled Laws of 1913, section 8665.
- Oklahoma\*—Revised Laws of 1910, section 6261.
- South Dakota\*—Compiled Laws of 1913, section 5723.
- Utah—Compiled Laws of 1907, section 3837.
- Wyoming\*—Compiled Statutes of 1910, section 5523.

**REVOCATION OF LETTERS.**

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|--|-------------------------------------|
| 1. Petition for revocation.              | 6. Who may obtain.                  |
| 2. Province of court.                    | 7. Who can not obtain.              |
| 3. Statutory priority.                   | 8. Letters may be revoked when.     |
| 4. Appointment is valid until set aside. | 9. Burden of proof.                 |
| 5. What operates as a revocation.        | 10. Letters not to be revoked when. |
|  | 11. Appeal.                         |

1. Petition for revocation.—It is sufficient, in a petition for the revocation for letters of administration, for the petitioner to allege merely his age, residence, and heirship of the decedent. This establishes his competency without any specific allegation as to the non-existence of all other matters, which, under the statute, might otherwise disqualify him. The statute which provides that the petitioner for revocation of letters shall allege or prove his competency does not deal with a matter of pleading or proof. It simply declares a right; that is, that one who otherwise would be entitled to letters may have letters which were previously issued revoked, if he is competent to act as administrator. There is no presumption that a person is a resident of the state, or of any particular age; and as to these matters it is therefore necessary for the petitioner to allege and prove them; but the presumptions are in his favor against the existence of any of the other disqualifications.—*Estate of Gordon*, 142 Cal. 125, 133, 75 Pac. 672. If such a petition fails to show that the jurisdictional facts did

not exist, it must be presumed, for the purposes of the application, that they did exist; and this applies to all necessary facts to give jurisdiction, including notice and residence.—*Estate of Griffith*, 84 Cal. 107, 109, 23 Pac. 528, 24 Pac. 381. A failure to demur to the petition to set aside the appointment of an administrator is a waiver of the objection that the petitioner had no legal capacity to sue.—*In re Tasanen's Estate*, 25 Utah 396, 71 Pac. 984, 985. In a proceeding in which one primarily entitled to the administration of an estate seeks the revocation of letters issued to his nominee, a strict technical observance of the rules of pleading in the preparation of the complaint was not required, it appearing at the hearing that defendant was not taken by surprise but was fully informed of the nature and scope of the charges made.—*In re Blackburn's Estate*, 48 Mont. 179, 137 Pac. 381. If a non-resident executor of the estate of a non-resident testator, which estate includes personalty located in California, petitions a California court for the revocation of ancillary letters of administration, held by a resident, and for the granting of letters testamentary to himself, it is immaterial that such executor is, at the time, defending a suit brought by such administrator relative to matters connected with the estate.—*Estate of Randall*, 177 Cal. 363, 170 Pac. 835. The right, under the statute, whereby the nominee of a surviving mother may be entitled to letters of administration, and to the revocation of prior letters, is not absolute and always available; the petition must show, prima facie, that the applicant is entitled to the relief sought.—*In re Infelise's Estate*, 51 Mont. 18, 149 Pac. 365; *Melzner v. Trucano*, 51 Mont. 18, 149 Pac. 365. Where the mother of an intestate, who resides in a foreign country, makes a written request that a designated person be appointed as administrator of her son's estate in this state, but, before its receipt and filing in court, letters of administration are granted to the public administrator, such request impliedly authorizes the nominee to take the necessary steps to secure the removal of the public administrator; hence, it is not necessary for the nominee's petition, asking for the revocation of letters held by the public administrator, to show on its face that the mother herself had requested revocation.—*In re Koller's Estate*, 40 Mont. 137, 142, 105 Pac. 549.

#### REFERENCES.

For various questions concerning newly discovered evidence on a petition for the revocation of letters of administration, see *In re McClellan's Estate*, 21 S. D. 209, 111 N. W. 540.

2. Province of court.—If letters of administration have been granted to some person other than husband or wife or child of the decedent, it makes no difference whether there was a will or not, if one of the persons preferred by the law asks that the administrator, with or without the will annexed, be removed and himself appointed. His request should be granted by the court, if he is legally competent to discharge the trust.—*Estate of Li Po Tai*, 108 Cal. 484, 488; 41 Pac.

486, 39 Pac. 30. And where the court has removed an administrator for neglect, mismanagement, and incompetency, it has the power to grant letters to the proper party.—*Estate of Pico*, 56 Cal. 413, 420; but it has no power to appoint a special administrator of the estate, until after the executrix thereof has been suspended or removed.—*Schroeder v. Superior Court*, 70 Cal. 343, 11 Pac. 651. Where the court had no jurisdiction to grant letters of administration upon an estate, it has power to revoke its appointment of the administrator, on a petition asking for his removal, where the want of jurisdiction to make such appointment appears from the record.—*Henkle v. Slate*, 40 Or. 349, 68 Pac. 399, 400. So the court has power, on motion, to set aside the appointment of a special administratrix, as having been inadvertently made.—*Raine v. Lawlor*, 1 Cal. App. 483, 82 Pac. 688, 689. And where the interests of the estate require it, the probate judge has ample power to remove a wasteful administrator or executor and to revoke his powers.—*In re Baldrige*, 2 Ariz. 299, 15 Pac. 141, 143.

3. Statutory priority.—A statute which provides that when letters have been granted "to any other person than the surviving husband, or wife, child, father, mother, brother, or sister, of the intestate," any one of such persons may obtain the revocation of the letters and be entitled to the administration, evidently deals with classes of persons who are given, respectively, statutory priority in their rights to letters of administration. It does not allow the former decree to be reviewed or assailed, but merely permits it to be superseded by a person of another and superior capacity. It refers to a case where letters have been granted to one not claiming, or having been adjudicated, to be one of the persons mentioned in such section, as, for instance, where the public administrator, or a creditor, or some other person legally competent, but not enumerated in said section, has been appointed. It does embrace a case where the one appointed had applied as one of the persons enumerated in the said section, and had been adjudicated by the court to be the surviving husband or wife, or one of the other persons enumerated therein.—*Estate of Aldrich*, 147 Cal. 343, 81 Pac. 1011, 1012. In California, when the petition for revocation of letters is based upon the statutory right to administer, and where the petitioner is not incompetent by reason of some statutory disqualification, section 1383 of the Code of Civil Procedure of that state applies, and the court has no discretion to deny his petition. Section 1354 of said code, giving the court discretionary power to remove or to retain an administrator with the will annexed, in the cases therein specified, does not apply, where the petition for the removal of the administrator with the will annexed is based upon the right to administer conferred upon the petitioner by the statute.—*Estate of Li Po Tai*, 108 Cal. 484, 488, 41 Pac. 486, 39 Pac. 30. Prior to 1880 there was no provision, if letters had once been issued, for their revocation at the instance of a nominee of the relatives named in the statute; but in that year the legislature amended the statute



by giving to the nominee of these relatives the right to obtain administration and to have the former letters revoked.—*Estate of Shiels*, 120 Cal. 347, 349, 52 Pac. 808.

4. Appointment is valid until set aside.—The appointment of a second administrator before the first one is removed is voidable. The original appointment, though erroneous, is valid until set aside in some appropriate proceeding.—*Estate of Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; *Schroeder v. Superior Court*, 70 Cal. 343, 11 Pac. 651; *Estate of Hamilton*, 34 Cal. 464; *Haynes v. Meeks*, 20 Cal. 288.

#### REFERENCES.

Validity of acts done by an executor or administrator under letters testamentary or of administration afterwards revoked or held invalid.—See note 21 L. R. A. 146-157.

5. What operates as a revocation.—The appointment of an administrator with the will annexed supersedes, per se, all former administrations of the estate.—*McCauley v. Harvey*, 49 Cal. 497, 505; but the removal of an administratrix from the state does not operate, ipso facto, as a revocation of the letters.—*Railway Co. v. McWherter*, 59 Kan. 345, sub nom. *Missouri, etc., Ry. Co. v. McWherter*, 53 Pac. 135. Where a testator devised and bequeathed specific real and personal property to B and appointed her sole executrix "as respects this property only," and subsequently made another testamentary paper "ratifying and confirming" all that was done by the prior instrument, and devising and bequeathing to S all the property, real, personal, and mixed, of which he died possessed, wherever located "except as willed and bequeathed as aforesaid," and appointing S sole executrix of said "last will and testament, except as aforesaid," it was held that the two instruments were properly admitted to probate as the last will and testament of the testator, and that the second appointment of S was not a revocation of the appointment of B and that S was not entitled to appointment as sole executrix.—*Estate of Luttet*, 23 Haw. 11, 18.

6. Who may obtain.—The only parties authorized under the statute to obtain the revocation of letters are the wife, child, father, mother, or brother of the intestate, and such persons are authorized to have the letters revoked only by presenting a petition "praying for the revocation" and that letters of administration may be issued to him or her, or to the nominee of relatives who have the right to letters of administration.—*Estate of Carr*, 25 Cal. 585, 587; *Estate of Shiels*, 120 Cal. 347, 349, 52 Pac. 808; *Estate of Kirtlan*, 16 Cal. 161, 165. It is to be borne in mind that a stranger is legally competent to act as administrator, though others are entitled to priority; but when letters have been granted to any other person than the surviving husband or wife, brother, etc., any one of them may obtain the revocation of the letters by presenting a petition to the probate court.—*Estate*

of Kirtlan, 16 Cal. 161, 165; and a prior right to letters of administration of an estate may be asserted at any time against one who has obtained a grant of letters by virtue of a secondary right. The assertion of a prior right to letters is expressly provided for in the statute; and if the right be established, and the applicant is found to be competent, the letters of the former administrator must be revoked, and a grant of letters of administration made to the applicant, unless he has waived his right and consented to the former appointment.—Estate of Wooten, 56 Cal. 322, 327; and a person is "competent" unless disqualified under the statute.—Estate of Pacheco, 23 Cal. 476. The policy of the law is to give a right to the surviving husband or wife, not only to administer, but also to have a person appointed on request. So fully does the law carry out this policy, that, if letters have been granted to a child, father, brother, or sister of the intestate, the surviving husband or wife may assert his or her prior right, and obtain letters of administration and have the prior letters revoked.—Estate of Dow, 132 Cal. 309, 310, 64 Pac. 402. If letters testamentary have been issued to an executor during his minority, and he has made an application to have them revoked, and the application is simply denied, without any reason being assigned, and without any finding of fact, such denial does not imply a finding of incompetency, and does not constitute a prior adjudication of a want of understanding as against a subsequent right to be appointed, provided he is found to possess the statutory competency.—Estate of Li Po Tai, 108 Cal. 484, 489, 41 Pac. 486, 39 Pac. 30. Letters of administration, issued without authority, may be set aside by the court in which they are issued, upon its own motion, or such action may be taken at the instance of any one interested in the administration; and where an action has been brought by the administrator against a railroad company to recover damages for an injury alleged to have caused the death of the intestate, the company has sufficient interest to make it a competent party to institute proceedings for a revocation of letters of administration.—Mallory v. Burlington, etc., R. R. Co., 53 Kan. 557, 36 Pac. 1059. A relative, who applies within the statutory time, is entitled to letters of administration as against a creditor. If the relative files his petition within the three months after decedent's death, the court errs in appointing a creditor within that time, because the relative has the superior right to the appointment of his nominee, but such appointment is not void for want of jurisdiction. It is simply erroneous, and is therefore voidable. Hence the letters may be revoked or set aside upon an application to the proper court for that purpose, made within the proper time, and by the parties entitled to priority in the issuance of such letters.—In re Owen's Estate, 32 Utah 469, 91 Pac. 283, 285. So far as the appointment of a creditor as administrator of the estate is concerned, an ex parte application for the appointment, containing an allegation that the petitioner is the principal creditor of the estate, would perhaps be sufficient to give the court jurisdiction

to make the appointment; but, when the regularity of an appointment already made is attacked and sought to be revoked, because issued to the wrong member of a class entitled to administer, the petitioner must affirmatively show, in an issuable form, facts which, if true, give him preference under the law.—*Cusick v. Hammer*, 25 Or. 472, 36 Pac. 525, 526. Where a person, not of kin to the decedent, has been appointed administrator on his own application, within the statutory thirty days, no kin appearing at the time and consenting, a person showing a right in himself to administer may have the appointment revoked; but this showing must be made.—*Franciscovich v. Walton*, 77 Or. 36, 150 Pac. 261. Denial of the petition of a widow for the revocation of letters of administration upon the estate of her husband theretofore issued to her stepson at her request, is error, where the waiver of her right to administer it herself had not been fairly procured or freely given.—*In re Blackburn's Estate*, 48 Mont. 179, 137 Pac. 381. If a widow renounces her right to administer her late husband's estate, in favor of her stepson, believing him friendly to her and not hostile to her claims, but he subsequently exhibits an attitude so generally hostile to the widow as to warrant the inference that he had held it before his appointment, and had carefully screened it from her until his position should be assured, it can not be said that her waiver was fairly procured and freely given; it is, therefore, error to deny her petition for the revocation of the stepson's letters.—*In re Blackburn's Estate*, 48 Mont. 179, 194, 137 Pac. 381.

7. Who can not obtain.—While a surviving husband or wife, etc., has a right to assert a prior right to letters of administration, and to have letters revoked by presenting a petition, etc., this right does not give to the nominee of the husband or wife, in the instances named in the statute, a right to have the letters revoked and to obtain letters for himself. In such a case the appointment of a nominee of the person entitled to administration is in the discretion of the court. The right to have letters issued to the nominee is the right of the surviving husband or wife, and not of the nominee.—*Estate of Shiels*, 120 Cal. 347, 349, 52 Pac. 808; *Estate of Carr*, 25 Cal. 585. The power to procure a revocation of letters, and the appointment of a nominee after letters have been issued to one not in the first five classes enumerated in section 1365 of the Code of Civil Procedure of California, is accorded to the members of those five classes and to their nominees by section 1383 of the same code. But it must be observed that the members of class seven, to which nephews and nieces belong, are not empowered to nominate under said section 1365, nor to secure a revocation of letters under section 1383 of that code. Their rights are wholly embraced within section 1379 of such code, and, under the last-named section, the nephews and nieces of the decedent do not have the absolute right of nomination and revocation of letters, but the appointment rests in the discretion of the court.—*Estate of Healy*, 122 Cal. 162, 164, 54 Pac. 736, 66 Pac.

175, 176. The statute does not authorize an application by the public administrator of one county for the revocation of letters issued to the public administrator of another county.—*Estate of Griffith*, 84 Cal. 107, 110, 23 Pac. 528, 24 Pac. 381. One who has no interest in the estate of a deceased person, which the widow is entitled to have set apart to her, is not entitled to file a petition to revoke letters of administration granted to the widow.—*Estate of Atwood*, 127 Cal. 427, 429, 59 Pac. 770. After an administrator has been in the performance of the duties of the office for more than sixteen months, no question having been raised, meantime, as to his appointment, and no complaints or criticisms have been made as to his acts, it is not error for the court to refuse to entertain a petition to revoke, although filed by a person who, under the statute, would have been entitled to administer in the first place.—*In re Infelise's Estate*, 51 Mont. 18, 149 Pac. 365; *Melzner v. Trucano*, 51 Mont. 18, 149 Pac. 365. Primarily the right to letters of administration is vested in the widow or her fit and competent nominee. But where a widow waives such right in favor of her nominee such waiver is final and estops her from afterwards claiming to have the letters revoked and herself appointed unless her renunciation was obtained by fraud or misrepresentation.—*In re Blackburn's Estate*, 48 Mont. 179, 137 Pac. 381. A petition for the revocation of the probate of an alleged invalid holographic will of a resident of the state of California and the admission to probate of a copy of an earlier will admitted to probate in a foreign jurisdiction is properly denied where the application is made by the assignee of a legatee under the latter will and no showing made by him of the execution of such will other than by a copy of the decree of the foreign court admitting it to probate.—*Estate of Zollkofer*, 167 Cal. 196, 138 Pac. 995.

8. Letters may be revoked when.—Where a creditor of the estate of the deceased entered into an agreement with the son-in-law of a sister of the deceased, whereby he agreed with the heirs to wait for the payment of his claim for a few weeks, at the expiration of which time they were to pay his bill, this constituted a waiver of his right to administer upon the estate, at least for a time; and his conduct in violating this agreement and obtaining his own appointment as administrator while the son-in-law and next of kin were attending the funeral of the deceased, in a distant state, should not be countenanced by the court; and where the son-in-law files a petition asking for the revocation of the letters issued to such creditor, and that he be appointed administrator in his stead, the letters are properly revoked, and the court will not review the discretion of the trial court in appointing the successor of the administrator.—*In re Farnham's Estate*, 41 Wash. 570, 84 Pac. 602, 603. It is also proper, on the application of one interested in the estate, to revoke letters testamentary or of administration, where the executor or administrator has become wasteful.—*In re Baldrige*, 2 Ariz. 299, 15 Pac. 141, 143.

That the estate is of insignificant value is no ground for dispensing with the statutory requirement of a bond on issuing letters of administration in Nevada and letters so issued are void and should be revoked.—*In re Bailey's Estate*, 31 Nev. 377, 103 Pac. 234. Court could revoke letters for failure of administrator to obey order requiring him to give additional bond.—*In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530. If a resident of another state having personal property in California, dies testate in such other state naming his wife as executrix, without bonds, and the testator's sister, residing in California is, seventy-seven days thereafter, granted, in California, letters of administration with the will annexed, the widow of the testator may go into a California court and ask that these letters be revoked and that letters testamentary be granted to herself; and the court will not, by complying, abuse its discretion.—*Estate of Randall*, 177 Cal. 363, 170 Pac. 835.

#### REFERENCES.

Revocation of letters of administration upon discovery of will.—See note 49 L. R. A. (N. S.) 894.

9. *Burden of proof*.—Upon the contest of a petition to revoke letters of administration and to issue letters to the petitioner, the onus probandi is on the contestant to show that the petitioner is incompetent to act as administrator. He must allege and prove facts showing that the petitioner is incompetent to act, although such petitioner is of age, and is a resident of the state, and qualified as an heir of the decedent. In the absence of any allegations of incompetency in the answer, a finding that the petitioner is not competent to act is outside of the issues, and unwarranted under the pleadings.—*Estate of Gordon*, 142 Cal. 125, 133, 75 Pac. 672.

10. *Letters not to be revoked when*.—A court can not revoke letters of administration, simply upon the ground that there was no occasion for administration upon the estate. Hence, where it appeared that decedent died intestate, without any debts, and leaving no property except a certain described piece of real estate, that after the death of said intestate, and before the grant of letters of administration, the heirs conveyed all their right, title, and interest in the property to the petitioner for the revocation of letters of administration, and the court concluded as a matter of law that there was no occasion for letters of administration upon the estate, and made an omnibus order vacating and setting aside its order appointing the administrator, revoking his letters, setting aside his order of sale of real estate, and, generally, all other orders and proceedings in the estate, and directing that the administration upon the said estate cease and determine, and awarding costs of the proceeding against the administrator, such order will be reversed upon appeal. Whatever the law may be in other jurisdictions, there is nothing in our probate law, which, either expressly or by implication, exempts the property of such estate from

the requirement of the administration.—Estate of Strong, 119 Cal. 663, 665, 51 Pac. 1078. If one who is entitled to letters of administration upon an estate waives his right, or refuses to make application therefor, and the court appoints another, but the one entitled afterwards makes application for letters, it is not error to refuse to revoke the letters already granted and to refuse to appoint the applicant.—Estate of Keane, 56 Cal. 407, 410. Although the provisions of section 1511 of the Code of Civil Procedure of California, taken literally lend support to the decision of the trial court that it is mandatory upon it to revoke the letters testamentary of an executor for failure to publish notice to creditors within two months, regardless of excuse, the more reasonable view is that the legislature intended to vest the trial judge with a wise discretion in the revocation of letters if it appears that the failure to publish notice is satisfactorily excused.—Estate of Chadbourne, 15 Cal. App. 363, 114 Pac. 1012.

11. Appeal.—The following are appealable orders: A denial of a petition to set aside the appointment of an administrator.—In re Tasanen's Estate, 25 Utah 396, 71 Pac. 984, 985; In re Sutton's Estate, 31 Wash. 320, 71 Pac. 1012; Estate of Gordon, 142 Cal. 125, 127, 75 Pac. 672; an order vacating the appointment of an administrator.—Estate of Bouyssou, 1 Cal. App. 657, 82 Pac. 1066. On appeal from an order vacating an order appointing an administrator, the action of the court in vacating its former decision in the same cause will be presumed to have been legally performed, and to be correct, in the absence from the record of any showing of error.—In re Bouyssou's Estate, 3 Cal. App. 39, 84 Pac. 460. On appeal from an order denying a petition for the revocation of letters of administration, the evidence may be reviewed, where the appeal was taken within sixty days after the entry of the order.—Estate of Gordon, 142 Cal. 125, 134, 75 Pac. 672. Where the statute provides for an appeal from the order of revocation of the letters of an administrator or executor, it keeps alive, ad interim, the character of the executor for the purposes of the appeal. But in all other respects the powers and functions of the former executor are suspended when the power of revocation is entered.—Estate of Crozier, 65 Cal. 332, 4 Pac. 109, 110; Estate of More, 86 Cal. 72, 24 Pac. 846. Where a will has been proved and the executors have been removed for failure to publish notice to creditors within the required time, pending an appeal from the order removing them they are suspended from office until the final determination of the appeal.—Estate of Chadbourne, 14 Cal. App. 481, 112 Pac. 472. If a court orders letters testamentary to be revoked, because executors, instead of obeying, appeal from an order either to make a sale mentioned or to show cause why their letters should not be revoked, the appeal suspends the revoking order.—Estate of Loyd, 175 Cal. 699, 167 Pac. 157. Evidence that a woman nominated as executrix of a will was not only immoral but promiscuous, prone to disorderly conduct, once the consort of a man who in spite of difference in race lived with her

at a saloon in the lower part of the city, and who had been arrested several times for vagrancy, and was living at the time of applying for letters testamentary in meretricious relations with a man not her husband, is sufficient to justify a finding of her want of integrity, and an order refusing her letters testamentary on that account will not be interfered with on appeal.—Estate of Munroe, 161 Cal. 10, Ann. Cas. 1913B, 1161, 118 Pac. 242.

## CHAPTER VI.

## OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.

- § 275. Administrator or executor to take oath. Letters and bond to be recorded.
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- § 307. Form. Order for citation, on petition of surety to be released.
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- § 309. Non-liability of new sureties.
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- § 313. Applications to be determined at any time.
- § 314. Liability on bond.

**BONDS OF EXECUTORS AND ADMINISTRATORS, AND LIABILITY THEREON.**

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| <ul style="list-style-type: none"> <li>1. Administration bonds.               <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) May be required when. Effect of failure to give.</li> <li>(3) Validity.</li> <li>(4) Joint and several bond. Effect of.</li> <li>(5) Additional bond. Further security.</li> </ul> </li> <li>2. Liability on administration bonds.               <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) Sureties' liability attaches when.</li> <li>(3) Conclusiveness upon sureties of accounting, distribution, and judgment.</li> <li>(4) Breach of bond.</li> <li>(5) Sureties are liable for what.</li> <li>(6) Liability of sureties for personal debts of executor or administrator.</li> <li>(7) Sureties are not liable for what.</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>(8) Joint liability. Subrogation. Contribution. Reimbursement.</li> <li>(9) Release. Termination of liability. Discharge. In general.</li> <li>(10) What does not release sureties.</li> <li>3. Action on bonds.               <ul style="list-style-type: none"> <li>(1) In general.</li> <li>(2) Successive administrations. Actions against sureties of defaulting administrators and deceased administrators or co-executors.</li> <li>(3) Leave to sue.</li> <li>(4) Restriction upon action against sureties.</li> <li>(5) Parties.</li> <li>(6) Pleadings.</li> <li>(7) Defense. What is and what is not.</li> <li>(8) Evidence.</li> <li>(9) Judgment.</li> <li>(10) Limitations of actions.</li> <li>(11) Appeal.</li> </ul> </li> </ul> |
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**§ 275. Administrator or executor to take oath. Letters and bond to be recorded.**

Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose.—*Kerr's Cyc. Code Civ. Proc.*, § 1387.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 806.  
 Colorado—Mills's Statutes of 1912, sections 7922, 8052.  
 Idaho\*—Compiled Statutes of 1919, section 7506.  
 Montana\*—Revised Codes of 1907, section 7451.  
 Nevada—Revised Laws of 1912, section 5910.  
 New Mexico—Statutes of 1915, sections 2230, 2231, 2233.  
 North Dakota—Compiled Laws of 1913, sections 8683, 8684.  
 Oklahoma\*—Revised Laws of 1910, section 6262.  
 South Dakota\*—Compiled Laws of 1913, section 5724.  
 Utah\*—Compiled Laws of 1907, section 3826.  
 Washington—Laws of 1917, chapter 156, page 659, section 66.  
 Wyoming—Compiled Statutes of 1910, sections 5527, 5529.

§ 276. Bond of administrators. Form and requirements of.  
 Penalty.

Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the superior court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of real property belonging to the estate, which values must be ascertained by the superior court, or a judge thereof, by examining on oath the party applying, and any other persons.—*Kerr's Cyc. Code Civ. Proc.*, § 1388.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1609.  
 Arizona\*—Revised Statutes of 1913, paragraph 807.  
 Colorado—Laws of 1915, chapter 173, page 491, amending Mills's Statutes of 1912, section 7923.  
 Idaho—Compiled Statutes of 1919, section 7507.  
 Kansas—General Statutes of 1915, sections 4487, 4493, 4497, 4691.  
 Montana\*—Revised Codes of 1907, section 7452.  
 Nevada—Revised Laws of 1912, section 5911.  
 New Mexico—Statutes of 1915, section 2231.  
 North Dakota—Compiled Laws of 1913, section 8685.  
 Oklahoma\*—Revised Laws of 1910, section 6264.

Oregon—Lord's Oregon Law, section 1153; as amended by Laws of 1917, chapter 30, page 38.

South Dakota—Compiled Laws of 1913, section 5726; as amended by Laws of 1916-17, chapter 184, page 242.

Utah—Compiled Laws of 1907, section 3327.

Washington—Laws of 1917, chapter 156, page 659, section 67.

Wyoming—Compiled Statutes of 1910, section 5528.

### § 277. Form. Bond given upon qualifying.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

Know all men by these presents, That we, — as principal, and — and — as sureties, are held and firmly bound to the state of — in the sum of — dollars (\$—), lawful money of the United States of America, to be paid to the said state of —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that whereas, by an order made on the — day of —, 19—, by the — court of the county <sup>2</sup> of —, state of —, the above-bounden — was appointed administrator <sup>3</sup> of the estate of —, deceased, and letters of administration <sup>4</sup> were directed to be issued to him upon his executing a bond according to law in said sum of — dollars (\$—).

Now, therefore, if the said —, as such administrator,<sup>5</sup> shall faithfully execute the duties of his trust according to law, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this — day of —, 19—.<sup>6</sup>

— [Seal]

— [Seal]

— [Seal]

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, city and county. <sup>3</sup> Or, executor. <sup>4</sup> Or, letters testamentary. <sup>5</sup> Or, executor. <sup>6</sup> This bond must be recorded: See § 275, ante.

**§ 278. Form. Acknowledgment, by corporation, of execution of bond.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

On this — day of —, one thousand nine hundred and —, before me, —, a notary public in and for the county <sup>3</sup> of —, state of —, residing therein, duly commissioned and sworn, personally appeared —, known to me <sup>4</sup> to be the president, and —, known to me <sup>5</sup> to be the secretary, of the —, the corporation described in and that executed the above bond, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the said county <sup>6</sup> of —, the day and year in this certificate first above written.

—, Notary Public in and for the County <sup>7</sup> of —,  
State of —.

**Explanatory notes.**—1 Give file number. 2, 3 Or, City and County.  
4, 5 Or, proved to me by the testimony of —, a competent witness on the question of identity. 6, 7 Or, city and county.

**§ 279. Form. Bond with numerous sureties.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

Know all men by these presents, That I, —, as principal, am held and firmly bound unto the state of — in the sum of one hundred thousand dollars (\$100,000), lawful money of the United States of America, to be paid to the said state of —, for which payment well and truly to be made I bind myself, and each of my heirs, executors, and administrators, firmly by these presents;

And that we, —, —, —, —, and —, as sureties, are severally held and firmly bound, and jointly

with the said —, are held and firmly bound, unto the said state of —, in the following sums, respectively, to wit: the said — in the sum of twenty thousand dollars (\$20,000), the said — in the sum of twenty thousand dollars (\$20,000), the said — in the sum of twenty thousand dollars (\$20,000), the said — in the sum of twenty thousand dollars (\$20,000), and the said — in the sum of twenty thousand dollars (\$20,000), lawful money of the United States of America, to be paid to the said state of —, for the payment of which sums well and truly to be made we and each of us, respectively, bind ourselves, and each of our heirs, executors, and administrators, jointly and severally, as aforesaid, firmly by these presents.

The condition of the above obligation is such, that, whereas, by an order of the —<sup>2</sup> of the county<sup>3</sup> of —, state of —, duly made and entered on the — day of —, the above-bounden —, in the matter of the estate of —, deceased, was appointed administrator<sup>4</sup> of the estate of the said —, deceased, and letters of administration<sup>5</sup> were directed to be issued to him upon his executing a bond according to law, in the said sum of one hundred thousand dollars (\$100,000), —

Now, therefore, if the said —, as such administrator,<sup>6</sup> shall faithfully execute the duties of his trust according to law, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this — day of —, 19—.

— [Seal]

— [Seal]

— [Seal]

— [Seal]

— [Seal]

— [Seal]

**Explanatory notes.**—1 Give file number. 2 Title of court. 3 Or, city and county. 4 Or, executor of the last will and testament of —, deceased. 5 Or, letters testamentary. 6 Or, executor. This bond must be recorded: See § 275, ante.

## § 280. Form. Bond with corporation as surety.

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Know all men by these presents, That we, — as principal, and — as surety, are held and firmly bound to the state of — in the sum of — dollars, lawful money of the United States of America, to be paid to the said state of —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas, by an order made on the — day of —, 19—, by the — <sup>2</sup> court of the county <sup>3</sup> of — state of —, the above-bounden — was appointed administrator <sup>4</sup> of the estate of —, deceased, and letters of administration <sup>5</sup> were directed to be issued to him upon his executing a bond according to law in the sum above named, —

Now, therefore, if the said —, as such administrator, <sup>6</sup> shall faithfully execute the duties of his trust according to law, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, The seal and signature of the said principal is hereto affixed, and the corporate seal and name of the said surety is hereto affixed and attested by its duly authorized officers, at —, county <sup>7</sup> of —, state of —, this — day of —, 19—. — [Seal]

[Corporate seal]

By —, President  
—, Secretary.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Title of court. <sup>3</sup> Or, city and county. <sup>4</sup> Or, executor. <sup>5</sup> Or, letters testamentary. <sup>6</sup> Or, executor. <sup>7</sup> Or, city and county. Corporations as sureties. See Kerr's Cal. Cyc. Code Civ. Proc., § 1056. Form of acknowledgment by corporation. See Kerr's Cal. Cyc. Civ. Code, § 1190.

**§ 281. Additional bond, when required.**

The superior court, or a judge thereof, must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold.—*Kerr's Cyc. Code Civ. Proc.*, § 1389.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 808.

Colorado—Mills's Statutes of 1912, sections 7923, 7977; and Laws of 1915, chapter 173, page 491, amending said section 7923.

Idaho\*—Compiled Statutes of 1919, section 7508.

Kansas—General Statutes of 1915, section 4606.

Montana\*—Revised Codes of 1907, section 7453.

Nevada—Revised Laws of 1912, section 5911.

New Mexico—Statutes of 1915, section 2233.

North Dakota—Compiled Laws of 1913, section 8686.

Oklahoma\*—Revised Laws of 1910, section 6265.

South Dakota—Compiled Laws of 1913, section 5727; as amended by Laws of 1916-17, chapter 184, page 242.

Utah\*—Compiled Laws of 1907, section 3828.

Washington—Laws of 1917, chapter 156, page 660, section 70.

Wyoming\*—Compiled Statutes of 1910, section 5530.

**§ 282. Form. Additional bond to be given on sale of real estate.**

[Title of court.]

[Title of estate.]

{ No. —. Dept. No. —.  
[Title of form.]

Know all men by these presents, That we, — as principal, and — and — as sureties, are held and firmly bound to the state of — in the sum of — dollars (\$—), lawful money of the United States of America, to be paid to the said state of —, for which payment

well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas an order was made on the — day of —, 19—, by the —<sup>1</sup> court of the county<sup>2</sup> of —, state of —, authorizing the above-named principal as administrator<sup>3</sup> of the estate of —, deceased, to sell certain real estate belonging to the estate of said deceased, and requiring that an additional bond be executed by said — in the sum above named, —

Now, therefore, if the said —, as such administrator,<sup>4</sup> shall faithfully execute the duties of his trust according to law, then this obligation to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this — day of —, 19—.

— [Seal]

— [Seal]

— [Seal]

Explanatory notes.—<sup>1</sup> Title of court. <sup>2</sup> Or, city and county. <sup>3</sup>, <sup>4</sup> Or, executor. This bond must be recorded. See § 275, ante.

### § 283. Conditions of bonds.

The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.—*Kerr's Cyc. Code Civ. Proc.*, § 1390.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 809.

Hawaii—Revised Laws of 1915, section 2499.

Idaho\*—Compiled Statutes of 1919, section 7509.

Montana\*—Revised Codes of 1907, section 7454.

Nevada—Revised Laws of 1912, section 5910.

North Dakota—Compiled Laws of 1913, section 8685.

Oklahoma\*—Revised Laws of 1910, section 6266.

South Dakota\*—Compiled Laws of 1913, section 5728.

Utah\*—Compiled Laws of 1907, section 3829.

Washington—Laws of 1917, chapter 156, page 659, section 67.

Wyoming—Compiled Statutes of 1910, section 5532.



**§ 284. Separate bonds when more than one administrator.**

When two or more persons are appointed executors or administrators, the superior court, or a judge thereof, must require and take a separate bond from each of them.

—*Kerr's Cyc. Code Civ. Proc.*, § 1391.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 810.
- Idaho\*—Compiled Statutes of 1919, section 7510.
- Kansas—General Statutes of 1915, section 3449.
- Montana\*—Revised Codes of 1907, section 7455.
- North Dakota\*—Compiled Laws of 1913, section 8688.
- Oklahoma\*—Revised Laws of 1910, section 6267.
- South Dakota\*—Compiled Laws of 1913, section 5729.
- Utah—Compiled Laws of 1907, section 3827.
- Washington—Laws of 1917, chapter 156, page 659, section 67.
- Wyoming—Compiled Statutes of 1910, section 5533.

**§ 285. Several recoveries may be had on same bond.**

The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.—*Kerr's Cyc. Code Civ. Proc.*,

§ 1392.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 811.
- Colorado—Mills's Statutes of 1912, section 8044.
- Idaho\*—Compiled Statutes of 1919, section 7511.
- Kansas—General Statutes of 1915, sections 4668-4670.
- Montana\*—Revised Codes of 1907, section 7456.
- Nevada\*—Revised Laws of 1912, section 5912.
- North Dakota\*—Compiled Laws of 1913, section 8803.
- Oklahoma\*—Revised Laws of 1910, section 6268.
- South Dakota\*—Compiled Laws of 1913, section 5730.
- Utah\*—Compiled Laws of 1907, section 3830.
- Washington—Laws of 1917, chapter 156, page 660, section 73.
- Wyoming\*—Compiled Statutes of 1910, section 5534.

**§ 286. Bonds, and justification of sureties on. Must be approved.**

In all cases where bonds or undertakings are required to be given, under this title, the sureties must justify

thereon in the same manner and in like amounts as required by section ten hundred and fifty-seven of this code, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by a judge of the superior court before being filed or recorded.—*Kerr's Cyc. Code Civ. Proc.*, § 1393.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 812.

Idaho—Compiled Statutes of 1919, section 7512.

Montana\*—Revised Codes of 1907, section 7457.

Nevada—Revised Laws of 1912, section 5913.

North Dakota—Compiled Laws of 1913, section 8627.

Oklahoma—Revised Laws of 1910, section 6269.

South Dakota—Compiled Laws of 1913, section 5731.

Utah—Compiled Laws of 1907, section 3831.

Washington—Laws of 1917, chapter 156, page 659, section 68.

## § 287. Form. Justification of sureties.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

— and —, the sureties named in the above bond, being duly sworn, each for himself says that he is a —<sup>3</sup> holder and resident within said state, and is worth the sum of — dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

—  
—

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.<sup>4</sup>

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 Freeholder or householder. 4 Or other officer taking the oath. As to requisites of undertakings, see *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1057.

**§ 288. Form. Justification of sureties on additional bond.**

[Title of court.]

[Title of estate.]

{ No. —. Dept. No. —.  
[Title of form.]State of —,  
County <sup>1</sup> of —, } ss.

— and —, being duly sworn, each for himself says that he is one of the sureties named in the above bond; that he is a resident and householder <sup>2</sup> within said state, and is worth the sum of — dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this — day of —, 19—.

—, Notary Public <sup>3</sup> in and for the county of —.  
State of —.

Explanatory notes.—<sup>1</sup> Or, City and County. <sup>2</sup> Or, freeholder. <sup>3</sup> Or other officer taking the oath.

**§ 289. Form. Examination of surety.**

[Title of court.]

[Title of estate.]

{ No. —.<sup>1</sup> Dept. No. —.  
[Title of form.]State of —,  
County <sup>2</sup> of —, } ss.

—, being duly sworn, deposes and says:

I am a citizen of the United States of America. I am — years of age. I reside in the state of —, and have so resided — years and upward. I am —.<sup>3</sup> My dwelling-house is No. —, — Street, in —.<sup>4</sup> My wife and family reside with me at that place. My business is that of —, and I carry on business as such at No. —, — Street, in —.<sup>5</sup>

I own real estate in the county, or city and county, of —, state of —. It consists of —.<sup>6</sup> I paid for that property the sum of — dollars (\$—). The land, exclusive of improvements, is worth at least — dollars

(\$——). The improvements are worth at least —— dollars (\$——). The premises are insured for —— dollars (\$——).

By the policy of insurance any loss which may accrue is made payable to ——. The conveyance of the land and premises above mentioned was from ——, and was recorded in the office of the recorder of the county <sup>7</sup> of —— about ——.<sup>8</sup> That conveyance is, to my best knowledge and recollection, an ——<sup>9</sup> deed. It conveyed the premises to me in my own right. It is made to me in my individual name, and the title is now, and ever since I purchased the property has remained, in my individual name, and I do not hold said property, or any part of it, or any share or interest of any kind in it, in trust for or in anywise for the benefit of any other person than myself. It is absolutely and exclusively my own.

As to mortgages, ——.<sup>10</sup> As to taxes and assessments, ——.<sup>11</sup> As to judgments, ——.<sup>12</sup> I am in partnership with ——.<sup>13</sup> My debts and liabilities are as follows: ——.<sup>14</sup>

Except as above stated, I am not liable as bail, bondsman, surety, indorser, guarantor, indemnitor, or otherwise, in any manner whatever; and, except as so stated, I do not owe any money and am not indebted to any person, firm, or company in any sum or upon any account whatever. No person holds a power of attorney from me for the sale of or the disposal of the property I have mentioned. I have not received any consideration, nor do I expect any, for going on the undertaking in the above-mentioned case. I have not been indemnified.

Subscribed and sworn to before me this —— day of ——, 19——.

——, County Clerk.

By ——, Deputy County Clerk.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, City and County. <sup>3</sup> Married, or as the fact may be. <sup>4, 5</sup> Name the town or city. <sup>6</sup> Give general statement. <sup>7</sup> Or, city and county. <sup>8</sup> State time as closely as possible. <sup>9</sup> Absolute, or according to the fact. <sup>10-12</sup> Give all necessary

**§ 290. Form. Affidavit that bond is insufficient.**

Before the judge approves any bond required under this title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause a notice to be issued to the executor or administrator requiring his ap-

pearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security.—*Kerr's Cyc. Code Civ. Proc.*, § 1394.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 813.
- Idaho—Compiled Statutes of 1919, section 7513.
- Montana\*—Revised Codes of 1907, section 7458.
- Nevada—Revised Laws of 1912, section 5914.
- New Mexico—Statutes of 1915, section 2233.
- Oklahoma—Revised Laws of 1910, section 6269.
- South Dakota—Compiled Laws of 1913, section 5731.
- Utah—Compiled Laws of 1907, section 3832.
- Washington—Laws of 1917, chapter 156, page 659, section 68.
- Wyoming\*—Compiled Statutes of 1910, section 5535.

#### § 292. Right ceases, when sufficient security not given.

If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.—*Kerr's Cyc. Code Civ. Proc.*, § 1395.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 814.
- Idaho\*—Compiled Statutes of 1919, section 7514.
- Montana\*—Revised Codes of 1907, section 7459.
- Nevada—Revised Laws of 1912, section 5915.
- Oklahoma\*—Revised Laws of 1910, section 6270.
- South Dakota\*—Compiled Laws of 1913, section 5732.
- Utah—Compiled Laws of 1907, section 3832.
- Washington—Laws of 1917, chapter 156, page 661, section 74.
- Wyoming\*—Compiled Statutes of 1910, section 5536.

#### § 293. When bond may be dispensed with. Order that executor file a bond, though will requires none.

When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary

may issue, and sales of real estate be made and confirmed without any bond, unless the court, for good cause, require one to be executed; but the executor may at any time afterward (if it appear from any cause necessary or proper) be required to file a bond, as in other cases.—*Kerr's Cyc. Code Civ. Proc.*, § 1396.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1609.
- Arizona\*—Revised Statutes of 1913, paragraph 815.
- Colorado—Mills's Statutes of 1912, section 7924.
- Idaho—Compiled Statutes of 1919, section 7515.
- Kansas—General Statutes of 1915, section 4488.
- Montana\*—Revised Codes of 1907, section 7460.
- Nevada—Revised Laws of 1912, section 5916.
- New Mexico—Statutes of 1915, section 2232.
- North Dakota\*—Compiled Laws of 1913, section 8687.
- Oklahoma\*—Revised Laws of 1910, section 6271.
- Oregon—Lord's Oregon Laws, section 1153.
- South Dakota\*—Compiled Laws of 1913, section 5733.
- Utah—Compiled Laws of 1907, section 3833.
- Washington\*—Laws of 1917, chapter 156, page 660, section 69.
- Wyoming\*—Compiled Statutes of 1910, section 5537.

#### § 294. Petition showing failing sureties. Further bonds.

Any person interested in an estate may, by verified petition, represent to the superior court, or a judge thereof, that the sureties of the executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or that from any other cause the bond is insufficient, and ask that further security be required.—*Kerr's Cyc. Code Civ. Proc.*, § 1397.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1617.
- Arizona\*—Revised Statutes of 1913, paragraph 816.
- Colorado—Mills's Statutes of 1912, section 7925.
- Idaho\*—Compiled Statutes of 1919, section 7516.
- Kansas—General Statutes of 1915, section 4672.
- Montana\*—Revised Codes of 1907, section 7461.
- Nevada—Revised Laws of 1912, section 5917.
- New Mexico—Statutes of 1915, sections 2233, 2234.

North Dakota—Compiled Laws of 1913, section 8693.  
 Oklahoma\*—Revised Laws of 1910, section 6272.  
 Oregon—Lord's Oregon Laws, section 1161.  
 South Dakota\*—Compiled Laws of 1913, section 5734.  
 Washington—Laws of 1917, chapter 156, page 660, section 70.  
 Wyoming—Compiled Statutes of 1910, section 5538.

**§ 295. Form. Petition for further security in case of failing sureties.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
 [Title of form.]

Now comes —, and by this, his verified petition, respectfully represents to this court<sup>2</sup> that he is a creditor<sup>3</sup> of the above-entitled estate, and is personally interested therein, and that the sureties<sup>4</sup> of the administrator<sup>5</sup> of such estate have become<sup>6</sup> insolvent.<sup>7</sup>

Wherefore your petitioner prays that a citation issue, directed to said administrator,<sup>8</sup> requiring him to show cause, if any he can, at the time and place specified by this court, why he should not give further security.<sup>9</sup>

—, Attorney for Petitioner. —, Petitioner.

[Add ordinary verification.]

Explanatory notes.—1 Give file number. 2 Or a judge thereof. 3 Or, heir at law, or legatee, or devisee of said deceased, according to the fact. 4 Or, one or more of them, giving names. 5 Or, executor. 6 Or, are becoming. 7 Or, that they have removed, or are about to remove, from the state; or, that, from any other cause, the bond is insufficient. 8 Or, administratrix; or, executor or executrix, etc., according to the fact. 9 If the petition contains a clause that the administrator or executor is wasting the property of said estate, by engaging in useless and expensive litigation with the creditors of said deceased, etc., or in any other way, the petitioner may ask that, in the meantime, the powers of such administrator or executor be suspended. See § 304, post.

**§ 296. Form. Order for citation to administrator or executor when sureties are insufficient.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
 [Title of form.]

The court being informed<sup>2</sup> that the sureties upon the bond of —, administrator<sup>3</sup> of the estate of —, de-



ceased, have become <sup>4</sup> insolvent, and that said administrator <sup>5</sup> is wasting said estate; and the court being satisfied that the matter requires investigation, —

It is ordered, That a citation issue to said administrator, <sup>6</sup> requiring him to appear before the above-entitled court on —, <sup>7</sup> the — day of —, 19—, at the court-room thereof, <sup>8</sup> at — o'clock in the forenoon <sup>9</sup> of that day, then and there to show cause why he should not give further security; and it is further ordered that his powers as administrator <sup>10</sup> be suspended until the further order of this court.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Where the order is not made on the court's own motion, say here, "by the affidavit of —"; or, "by the allegations of the petition of —." <sup>3</sup> Or, administratrix; or, executor or executrix, etc., according to the fact. <sup>4</sup> Or, are becoming. <sup>5, 6</sup> Or as the case may be. <sup>7</sup> Day of week. <sup>8</sup> Giving number of department, if any, and location of court-room. <sup>9</sup> Or, afternoon. <sup>10</sup> Or according to the fact.

**§ 297. Citation to executor, etc., to show cause against such application.**

If the court, or a judge thereof, is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or can not be found, it may be served by leaving a copy of it at his place of residence, or by such publication as the court, or a judge thereof, may order.—*Kerr's Cyc. Code Civ. Proc.*, § 1398.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

**Alaska**—Compiled Laws of 1913, section 1617.

**Arizona\***—Revised Statutes of 1913, paragraph 817.

**Colorado**—Mills's Statutes of 1912, section 7925.

**Idaho**—Compiled Statutes of 1919, section 7517.

Montana\*—Revised Codes of 1907, section 7462.  
Nevada—Revised Laws of 1912, section 5918.  
New Mexico—Statutes of 1915, section 2233.  
North Dakota—Compiled Laws of 1913, section 8693.  
Oklahoma\*—Revised Laws of 1910, section 6273.  
Oregon—Lord's Oregon Laws, section 1161.  
South Dakota\*—Compiled Laws of 1913, section 5735.  
Wyoming—Compiled Statutes of 1910, section 5539.

**§ 298. Form. Citation to representative when sureties are insufficient.**

**[Title of court.]**

**[Title of estate.]**

{ No. —.1 Dept. No. —.  
[Title of form.]

To —, Administrator <sup>2</sup> of the Estate of —, Deceased.

It having come to the knowledge of the court <sup>3</sup> that the sureties on your bond as administrator <sup>4</sup> of the said estate are insolvent,<sup>5</sup> you are hereby cited to appear before the above-entitled court, at the court-room thereof,<sup>6</sup> in said county,<sup>7</sup> on —,<sup>8</sup> the — day of —, 19—, at ten o'clock in the forenoon <sup>9</sup> of that day, and show cause, if any you can, why you should not be required to give further security.

[Seal]

—, Clerk of the — Court.

**Explanatory notes.**—1 Give file number. 2 Or, administratrix; or, executor or executrix, etc., according to the fact. 3 If a petition or affidavit has been filed, say here, "by the allegations of the petition of —"; or, "by the affidavit of —." 4 Or as the fact may be. 5 Or, are becoming insolvent. 6 Give number of department, if any, and location of court-room. 7 Or, city and county. 8 Day of week. 9 Or, afternoon.

**§ 299. Form. Order that further security be given.**

**[Title of court.]**

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

It appearing that the citation heretofore issued, requiring the administrator <sup>2</sup> of the above-entitled estate to show cause why he should not be required to give further security, has been served and returned, and the said administrator <sup>3</sup> having this day appeared before me at the

time and place named in said citation, the court proceeds to hear the allegations and proofs; and the court, after such hearing, being satisfied that the security afforded by the bond of such administrator <sup>4</sup> is inadequate,<sup>5</sup>—

It is ordered, That the said administrator,<sup>6</sup> within — days from the making of this order, file a new bond,<sup>7</sup> as administrator <sup>8</sup> of said estate, in the sum of — dollars (\$—), in the form prescribed by law, and with sureties to be approved by the judge of this court.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2-4 Or, administratrix; or, executor or executrix, etc., according to the fact. <sup>5</sup> "By reason of the insolvency of one or more of the sureties," or as the case may be. <sup>6</sup> Or, according to the fact. <sup>7</sup> Or, give further security, as the court may order. <sup>8</sup> Or, executor.

### § 300. Hearing. Further security may be ordered when.

On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is, from any cause, insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form, within a reasonable time, not less than five days.—*Kerr's Cyc. Code Civ. Proc.*, § 1399.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1617.
- Arizona\*—Revised Statutes of 1913, paragraph 818.
- Colorado—Mills's Statutes of 1912, section 7925.
- Idaho\*—Compiled Statutes of 1919, section 7518.
- Kansas—General Statutes of 1915, section 4672.
- Montana\*—Revised Codes of 1907, section 7463.
- Nevada—Revised Laws of 1912, section 5919.
- New Mexico—Statutes of 1915, section 2233.
- North Dakota—Compiled Laws of 1913, section 8695.
- Oklahoma\*—Revised Laws of 1910, section 6274.
- Oregon—Lord's Oregon Laws, section 1161.
- South Dakota\*—Compiled Laws of 1913, section 5736.
- Wyoming—Compiled Statutes of 1910, section 5540.

### § 301. Neglecting to obey order.

If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.—*Kerr's Cyc. Code Civ. Proc.*, § 1400.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1618.
- Arizona\*—Revised Statutes of 1913, paragraph 819.
- Colorado—Mills's Statutes of 1912, section 7925.
- Idaho\*—Compiled Statutes of 1919, section 7519.
- Montana\*—Revised Codes of 1907, section 7464.
- Nevada\*—Revised Laws of 1912, section 5920.
- North Dakota—Compiled Laws of 1913, section 8695.
- Oklahoma\*—Revised Laws of 1910, section 6275.
- Oregon—Lord's Oregon Laws, section 1162.
- South Dakota\*—Compiled Laws of 1913, section 5737.
- Washington—Laws of 1917, chapter 156, page 655, section 52.
- Wyoming—Compiled Statutes of 1910, section 5541.

### § 302. Form. Order revoking letters on failure to give further security.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

An order having been made by the judge of this court on the — day of —, 19—, requiring —, the administrator <sup>2</sup> of said estate, to give further security <sup>3</sup> on his bond as such administrator <sup>4</sup> within — days from the time of making said order, and said time having expired, and said administrator <sup>5</sup> having neglected to file such further security <sup>6</sup> within the time as aforesaid, —

It is ordered, That the letters of administration <sup>7</sup> heretofore granted to the said — be, and the same are hereby, revoked.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 Or, executor, etc., according to the fact. 3 Or, a new bond. 4, 5 Or, executor, etc., according to the fact. 6 Or, new bond. 7 Or, letters testamentary. See § 311, post.

**§ 303. Suspending powers of executor, etc.**

When a petition is presented praying that an executor or administrator be required to give further security, or to give bond, where, by the terms of the will, no bond was originally required, and it is alleged, on oath, that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.—*Kerr's Cyc. Code Civ. Proc.*, § 1401.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 820.
- Idaho\*—Compiled Statutes of 1919, section 7520.
- Montana—Revised Codes of 1907, section 7465.
- Nevada—Revised Laws of 1912, section 5921.
- Oklahoma—Revised Laws of 1910, section 6276.
- South Dakota\*—Compiled Laws of 1913, section 5738.
- Wyoming—Compiled Statutes of 1910, section 5542.

**§ 304. Further security on court's own motion.**

When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.—*Kerr's Cyc. Code Civ. Proc.*, § 1402.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1621.
- Arizona\*—Revised Statutes of 1913, paragraph 821.
- Colorado—Mills's Statutes of 1912, section 7925.
- Idaho\*—Compiled Statutes of 1919, section 7521.
- Kansas—General Statutes of 1915, section 4672.
- Montana\*—Revised Codes of 1907, section 7466.
- Nevada\*—Revised Laws of 1912, section 5922.
- New Mexico—Statutes of 1915, section 2233.
- North Dakota—Compiled Laws of 1913, section 8694.
- Oklahoma\*—Revised Laws of 1910, section 6277.
- Oregon—Lord's Oregon Laws, section 1165.

South Dakota\*—Compiled Laws of 1913, section 5739.

Washington—Laws of 1917, chapter 156, page 660, section 70.

Wyoming—Compiled Statutes of 1910, section 5543.

### § 305. Release of surety.

When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the superior court, or a judge thereof, for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place, to be therein specified, and to give other security. If he has absconded, left, or removed from the state, or if he can not be found, after due diligence and inquiry, service may be made as provided in section one thousand three hundred and ninety-eight.—*Kerr's Cyc. Code Civ. Proc.*, § 1403.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 822.

Colorado—Mills's Statutes of 1912, section 7929.

Idaho—Compiled Statutes of 1919, section 7522.

Kansas—General Statutes of 1915, section 4673.

Montana\*—Revised Codes of 1907, section 7467.

Nevada—Revised Laws of 1912, section 5923.

New Mexico—Statutes of 1915, section 2235.

North Dakota—Compiled Laws of 1913, section 8696.

Oklahoma\*—Revised Laws of 1910, section 6278.

South Dakota\*—Compiled Laws of 1913, section 5740.

Utah—Compiled Laws of 1907, section 3834.

Wyoming—Compiled Statutes of 1910, section 5544.

### § 306. Form. Petition of surety to be released.

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

To the Honorable the — <sup>2</sup> Court of the County <sup>3</sup> of —,  
State of —.

The petition of — respectfully states: That — is  
the administrator <sup>4</sup> of the estate of —, deceased; and  
that, on qualifying as such administrator, <sup>5</sup> he, the said

—, gave a bond as such administrator,<sup>6</sup> which was duly filed and recorded in this court, and is now in force;

That your petitioner is a surety on said bond, but that he now desires to be released from all responsibility thereon as such surety, by reason of any future act or acts of said administrator.<sup>7</sup>

Wherefore petitioner prays that this court cause a citation to issue to the said administrator,<sup>8</sup> requiring him to appear at a time and place therein specified, to give other security, and that petitioner be released from further liability by reason of said bond. —, Petitioner.

—, Attorney for Petitioner.

**Explanatory notes.**—1 Give file number. 2 Title of court. 3 Or, city and county. 4-8 Or, executor, etc.

**§ 307. Form. Order for citation, on petition of surety to be released.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

It appearing that —, a surety on the bond of —, administrator<sup>2</sup> of the estate of —, deceased, has filed herein his petition to be released from responsibility on account of any future act or acts of said —, as such administrator,<sup>3</sup>—

It is ordered, That a citation issue to said administrator,<sup>4</sup> requiring him to appear before this court,<sup>5</sup> at the court-room thereof, at —,<sup>6</sup> in the said county<sup>7</sup> of —, state of —, on the — day of —, 19—, at the hour of — o'clock in the forenoon<sup>8</sup> of said day, and give further security.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2-4 Or, executor. 5 Or, me, at chambers. 6 State location of court-room. 7 Or, city and county. 8 Or according to the fact.

**§ 308. Form. Citation to administrator to give further security, where surety seeks to be released.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

To —, Administrator <sup>2</sup> of the Estate of —, Deceased.

You are hereby cited to appear before the above-entitled court,<sup>3</sup> at the court-room thereof, at —,<sup>4</sup> in the said county <sup>5</sup> of —, state of —, on the — day of —, 19—, at the hour of — o'clock in the forenoon <sup>6</sup> of said day, and give further security, one of your bondsmen, to wit, —, having petitioned to be released from further responsibility on account of any future act or acts of yours, and the court having made an order that this citation issue.

[Seal]

—, Clerk of the — Court.

**Explanatory notes.**—1 Give file number. 2 Or, executor. 3 Or, before the judge thereof, at chambers. 4 State location of court-room. 5 Or, city and county. 6 Or, afternoon, as the case may be.

**§ 309. Non-liability of new sureties.**

If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator.—*Kerr's Cyc. Code Civ. Proc.*, § 1404.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1618.
- Arizona\*—Revised Statutes of 1913, paragraph 823.
- Colorado—Mills's Statutes of 1912, section 7929.
- Idaho\*—Compiled Statutes of 1919, section 7523.
- Kansas—General Statutes of 1915, section 4673.
- Montana\*—Revised Codes of 1907, section 7468.
- Nevada\*—Revised Laws of 1912, section 5924.
- New Mexico—Statutes of 1915, section 2235.
- North Dakota—Compiled Laws of 1913, section 8696.
- Oklahoma\*—Revised Laws of 1910, section 6279.
- Oregon—Lord's Oregon Laws, section 1162.



South Dakota\*—Compiled Laws of 1913, section 5741.

Utah\*—Compiled Laws of 1907, section 3835.

Wyoming—Compiled Statutes of 1910, section 5545.

§ 310. Form. Order that surety be released.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

The petition of —, a surety on the bond of —, administrator <sup>2</sup> of the estate of —, deceased, having been filed herein, and such proceedings having afterwards been had that the said administrator <sup>3</sup> has given new sureties to the satisfaction of the judge of this court,—

It is ordered, That the said — shall not be liable as surety on said bond for any act, default, or misconduct of said administrator <sup>4</sup> subsequently to the making of this order. —, Judge of the — Court.

Dated —, 19—.

Explanatory notes.—1 Give file number. 2-4 Or, administrator.

§ 311. Neglect to give new sureties forfeits letters.

If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters.—*Kerr's Cyc. Code Civ. Proc.*, § 1405.

ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 824.

Colorado—Mills's Statutes of 1912, section 7928.

Idaho\*—Compiled Statutes of 1919, section 7524.

Kansas—General Statutes of 1915, section 4673.

Montana\*—Revised Codes of 1907, section 7469.

Nevada—Revised Laws of 1912, section 5925.

New Mexico—Statutes of 1915, section 2236.

North Dakota—Compiled Laws of 1913, section 8696.

Oklahoma\*—Revised Laws of 1910, section 6280.

South Dakota\*—Compiled Laws of 1913, section 5742.

Utah—Compiled Laws of 1907, section 3836.

Washington—Laws of 1917, chapter 156, page 661, section 74.

Wyoming—Compiled Statutes of 1910, section 5546.

**§ 312. Form. Order revoking letters on failure to give new sureties.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

It being shown to the court that —, one of the sureties on the bond of —, administrator <sup>2</sup> of the estate of —, deceased, on the — day of —, 19—, filed a petition herein to be released from liability for the future acts of said administrator;<sup>3</sup> and it appearing that said administrator <sup>4</sup> was duly cited to appear <sup>5</sup> on the — day of —, 19—, to give new sureties, but that said administrator <sup>6</sup> failed to give new sureties at the time and place required in such citation,<sup>7</sup> and that said time has expired, without such new sureties having been given,—

It is ordered, That the letters of administration <sup>8</sup> heretofore granted to the said — be, and the same are hereby, revoked. —, Judge of the — Court.

Dated —, 19—.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2-4</sup> Or, executor, etc., according to the fact. <sup>5</sup> Before the court, or a judge thereof, as the case may be. <sup>6</sup> Or, executor, etc., as the case may be. <sup>7</sup> Or, within — days' additional time granted in which to give such new sureties. <sup>8</sup> Or, letters testamentary. See § 301, ante.

**§ 313. Applications to be determined at any time.**

The applications authorized by the nine preceding sections of this chapter may be heard and determined at any time. All orders made therein must be entered upon the minutes of the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1406.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 825.

Idaho\*—Compiled Statutes of 1919, section 7525.

Oklahoma\*—Revised Laws of 1910, section 6281.

South Dakota\*—Compiled Laws of 1913, section 5743.

Washington—Laws of 1917, chapter 156, page 661, section 75.

Wyoming\*—Compiled Statutes of 1910, section 5547.

### § 314. Liability on bond.

The liability of principal and sureties upon the bond of any executor, administrator, or guardian, is in all cases to pay in the kind of money or currency in which the principal is legally liable.—*Kerr's Cyc. Code Civ. Proc.*, § 1407.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 826.

Washington—Laws of 1917, chapter 156, page 660, section 73.

#### BONDS OF EXECUTORS AND ADMINISTRATORS, AND LIABILITY THEREON.

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| <p>1. Administration bonds.</p> <p>(1) In general.</p> <p>(2) May be required when. Effect of failure to give.</p> <p>(3) Validity.</p> <p>(4) Joint and several bond. Effect of.</p> <p>(5) Additional bond. Further security.</p> <p>2. Liability on administration bonds.</p> <p>(1) In general.</p> <p>(2) Sureties' liability attaches when.</p> <p>(3) Conclusiveness upon sureties of accounting, distribution, and judgment.</p> <p>(4) Breach of bond.</p> <p>(5) Sureties are liable for what.</p> <p>(6) Liability of sureties for personal debts of executor or administrator.</p> <p>(7) Sureties are not liable for what.</p> | <p>(8) Joint liability. Subrogation. Contribution. Reimbursement.</p> <p>(9) Release. Termination of liability. Discharge. In general.</p> <p>(10) What does not release sureties.</p> <p>3. Action on bonds.</p> <p>(1) In general.</p> <p>(2) Successive administrations. Actions against sureties of defaulting administrators and deceased administrators or co-executors.</p> <p>(3) Leave to sue.</p> <p>(4) Restriction upon action against sureties.</p> <p>(5) Parties.</p> <p>(6) Pleadings.</p> <p>(7) Defense. What is and what is not.</p> <p>(8) Evidence.</p> <p>(9) Judgment.</p> <p>(10) Limitations of actions.</p> <p>(11) Appeal.</p> |
|---|---|

#### 1. Administration bonds.

(1) In general.—While it is true that the administrator is not authorized to act until he has given a bond, the mere order of time in which the act of receiving the letters and the act of giving the bond are performed will not affect the validity of his appointment, nor any act performed by him after giving the bond, where no official act was performed by him before his bond was made and approved.

The fact that he does not present his bond for approval until several days after the issuance of letters to him and the taking of the oath of office, does not require the issuance of any letters after such bond is given.—*Ions v. Harbison*, 112 Cal. 260, 267, 44 Pac. 572.

## REFERENCES.

Execution of executors or administrator's bond on condition that others shall sign.—See note 45 L. R. A. 340, 341.

(2) May be required when. Effect of failure to give.—In California, an administrator is not authorized to act until he has given a bond.—*Ions v. Harbison*, 112 Cal. 260, 267, 44 Pac. 572. But, in Utah, the failure to give a bond does not necessarily avoid the letters of administration. It only makes them voidable.—*Harris v. Chipman*, 9 Utah 101, 33 Pac. 242. Section 1401 of the Code of Civil Procedure of California does not conflict with section 1396 of that code, which gives the probate court the general power to require a bond in proper cases.—*Estate of White*, 53 Cal. 19, 20. The English rule permitting an executor to administer upon the estate of his intestate, without giving bonds in the first instance, prevails in many states, but in the majority of them, including Oregon, the privilege is given only when the will expressly so directs. The only effect of the statute in that state allowing the testator to exempt his executor from giving bond is to relieve him therefrom in the first instance, but it is plainly not only the right, but in many instances also the duty, of the county court, when it has reason to suspect that an estate will be fraudulently administered, or the property thereof lost to those interested in it, on a proper application by a legatee or creditor, to require the executor to give a bond, notwithstanding such exemption in the will.—*Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 716, 717. Although the county court in that state has no authority to require an executor to give bonds in the first instance for the faithful execution of the trust reposed in him, where the will expressly provides that no bonds shall be required of him, yet a bond given voluntarily, which contains no conditions unauthorized by law, and none against public policy, and which is good as a common-law obligation, is valid.—*Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 717.

(3) Validity.—The plain meaning of section 1388 of the Code of Civil Procedure of California is, that the principal and sureties must sign the bond before letters can be issued, for, obviously, there can be no execution without signing. The decisions are somewhat conflicting on the proposition as to whether the sureties can be held liable on a bond which purported to be joint and several, but which has not been signed by the principal. If, however, a bond is not, in form, the joint and several obligation of all the parties, as it should be, but is the joint obligation of the principal and sureties, and the several obligation only of the latter, the bond, not having been

executed by the principal, is not valid for any purpose, and the sureties are not liable thereon, unless there is evidence showing that they intended to be bound without requiring the principal's signature.—*Weir v. Mead*, 101 Cal. 125, 128, 130, 40 Am. St. Rep. 46, 35 Pac. 567. As a matter of law, it is immaterial where the signature of one signing a bond may be. It is as binding when found anywhere else on the paper as it is when appearing at the end, the question being always open whether the party, not having signed it regularly at the foot, meant to be bound by it as it stands, or whether he left it so unsigned because he refused to complete it. Hence, if the bond of an administrator is delivered without the principal's signature, this does not violate an agreement with the sureties that the bond was not to be filed with the probate court until the principal had signed it, if his name was signed in the body of the instrument before delivery.—*Kenck v. Parchen*, 22 Mont. 519, 74 Am. St. Rep. 625, 57 Pac. 94, 95. "The state of California" and "the people of the state of California" describe the same party, and a statute which requires a bond to be given in the one name is satisfied by a bond given in the other.—*People v. Love*, 19 Cal. 676, 681; *Tevis v. Randall*, 6 Cal. 632, 635, 65 Am. Dec. 547. Where the authority of an executor is revoked and an administrator with the will annexed is appointed, it is not essential to the validity of the bond to be given by him, as such, that his special character should be recited therein; a bond in the ordinary form required of general administrators by the statute is valid and proper.—*Bull v. Bal*, 17 N. M. 466, 130 Pac. 251.

(4) *Joint and several bond. Effect of.*—Under section 1391 of the Code of Civil Procedure of California, when two or more persons are appointed executors or administrators, the superior court must require a separate bond from each; and when executors give a joint and several bond, the effect is to make them jointly and severally liable, on such bond, for the misconduct of each.—*Estate of Sander-son*, 74 Cal. 199, 213, 15 Pac. 753.

(5) *Additional bond. Further security.*—Those provisions of the statute authorizing the requirement of "further security" are intended to be cumulative. The very purpose of requiring "further security" is to strengthen, not to increase, the security previously existing; and it is obvious that the purpose would fall unless both bonds relate to the same subject-matter.—*Lacoste v. Splivalo*, 64 Cal. 35, 40, 30 Pac. 571. The title to property sold by an executor passes, though no bond is given.—*Evans v. Gerken*, 105 Cal. 311, 313, 38 Pac. 725. The statute provides that an additional bond must, under certain circumstances, be required by the probate judge when he orders a sale of real estate; and when a party objects to the confirmation of the sale, on the ground that the bond required by the probate judge was not in fact given, the objecting party should be permitted to submit his proof in support of the objection.—*Estate of Arguello*, 50 Cal. 308,

310. The statute declares that the mere failure to give the security within the time fixed by the judge's order shall, of itself, and without any further action on the part of the court, cause the right of the administrator to cease. It does not require any order to be served upon him. Hence, upon the failure of the administrator to file additional security required by order of the court, and the consequent cessation of his right to the administration of the estate, the court is required to appoint as administrator "the person next entitled to the administration on the estate, who will execute a sufficient bond," and is authorized to make an order suspending the powers of the administrator until such further appointment can be made, and in the meantime to appoint a special administrator of the estate.—*Barrett v. Superior Court*, 111 Cal. 154, 158, 43 Pac. 519. The statute of Oregon does not require the executor to give an additional undertaking before entering upon the duties of his administration; but where the duty of administering the partnership property of the deceased devolves upon an administrator by the surviving partner's failure to qualify, he is not exonerated from giving the additional undertaking required by the statute.—*Palicio v. Bigne*, 15 Or. 142, 13 Pac. 765, 767. The heirs at law are authorized to ask for further security, and it is the duty of the court, whenever it comes to its knowledge that the bond of an executor or administrator is insufficient, to require him to file additional security, or an additional bond; and when such bond has been given by the executor or administrator, either voluntarily or after an order requiring him to file it, it does not affect the rights and liabilities of another surety upon the original bond.—*Elizalde v. Murphy*, 146 Cal. 168, 171, 79 Pac. 866. A special bond may be required in a proper case, it being for the court to determine to what extent additional security is necessary.—*In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530. Where on settlement of administrator's account additional security was found necessary, it could be required though appeal was pending from order settling account.—*In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530. Discretion of court is not disturbable except for abuse.—*In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530.

## 2. Liability on administration bonds.

(1) *In general.*—It has been repeatedly held that an action can not be maintained against the sureties of an executor, administrator, or guardian for breach of the bond until the amount of indebtedness has been determined by order of the probate court.—*Nickals v. Stanley*, 146 Cal. 724, 726, 81 Pac. 117; *Reither v. Murdock*, 135 Cal. 197, 67 Pac. 784; *Chaquette v. Ortet*, 60 Cal. 594, 599. But in case of a debt due from the executor to the testator long before the latter's death, which has been properly included in the inventory as money in the hands of the executor, the sureties on the bond of the executor are answerable for the default of the executor in not making payment, and

without demand or notice. In such a case the liability of the principal is fixed.—*Treweek v. Howard*, 105 Cal. 434, 446, 39 Pac. 20. But an action may be brought in a court of equity to have the account of a deceased guardian settled, and for a judgment against the sureties for the sum that may be found due to the plaintiff upon such settlement, without a separate suit in equity to settle and determine the liability of the deceased guardian, where all the parties in interest are before the court. One suit is all that is necessary. It matters not that part of the relief is equitable and part of it legal, nor under which head it may be placed. The result of the suit is the same as the result of two would have been.—*Zurfluh v. Smith*, 135 Cal. 644, 647, 67 Pac. 1089. Sureties are entitled to stand upon the precise terms of their contract, and if the bond is limited to the duties cast upon the principal, the liabilities can not be extended.—*Treweek v. Howard*, 105 Cal. 434, 444, 39 Pac. 20. But sureties on the bond of an executor or administrator are answerable for the faithful execution of the duties of his trust, without regard to the time of the execution of the bond.—*Lacoste v. Splivalo*, 64 Cal. 35, 41, 30 Pac. 571. Sureties are all liable in the same action.—*Slater v. McAvoy*, 123 Cal. 437, 440, 56 Pac. 49. Sureties on official bonds are liable only for defaults occurring after the commencement of the term of office for which they become answerable; but this rule has no application to an executor's or administrator's bond, because the law under which and the purpose for which they are given are different. There are no terms of office of an executor or administrator. It is a continuous employment from the date of appointment until the close of the administration, and the sureties on the bond of an executor or administrator, conditioned for the faithful performance of his duties, are answerable for assets which have been misapplied by him before the execution of the bond, but subsequent to his appointment. A surety on the administrator's or executor's bond is liable for whatever is properly chargeable to the executor in his official capacity; and it is not necessary to show that the fund, or property so chargeable, was actually on hand, intact, or in specie at the time the bond was executed. If it is shown to have come into the hands of the executor in his official capacity, and he has not properly disposed of or accounted for it, he is bound to do so on final settlement; and the sureties on his bond, whenever given, are held for the faithful performance of that duty.—*Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 718, 719; *Greer v. McNeal*, 11 Okla. 526, 69 Pac. 893, 899. Where an executor, who is a residuary legatee, executes a bond to pay all debts and legacies of the testator, he and his sureties become absolutely liable, to the extent of the penalty of the bond, for all debts and legacies, regardless of the amount or value of the assets of the estate; and where a specific legacy is not paid when due, the legatee may, without obtaining an order of allowance by the probate court, and upon demand and refusal of payment, maintain an action for the recovery of such legacy against

the obligors of the bond.—*Kreamer v. Kreamer*, 52 Kan. 597, 35 Pac. 214.

(2) *Sureties' liability attaches when.*—The general rule is, that the liability of a surety on an administrator's or guardian's bond depends upon the liability of the principal, and does not attach until that has been ascertained and determined by the judgment of a court of competent jurisdiction.—*Reither v. Murdock*, 135 Cal. 197, 198, 67 Pac. 784; *Nickals v. Stanley*, 146 Cal. 724, 726, 81 Pac. 117. The poverty or riches of their principal, the condition of the estate, and where and how invested, are proper subjects of inquiry for sureties on the bond of an executor or administrator, in determining whether or not to become responsible, but can not be urged as reasons to excuse them from the liability which they assume. Nor can the representations of their principal as to his financial position avail the sureties.—*Treweek v. Howard*, 105 Cal. 434, 446, 39 Pac. 20. A surety is a principal debtor, and no demand is necessary before action. If a demand is necessary, the bringing of a suit is sufficient.—*Bolles v. Bird*, 12 Colo. App. 78, 54 Pac. 403. Where the heirs to an estate had nothing to do with the procurement of sureties on the administrator's bond, they will not be charged with bad faith in failing to inform an additional surety of their suspicions of misconduct of the administrator, where their petition for his removal set forth his derelictions of duty as a matter of record, and the additional surety will be liable on the bond.—*Ellizalde v. Murphy*, 163 Cal. 681, 126 Pac. 973.

#### REFERENCES.

*Liability of sureties in proceedings against them on the bond of an executor or administrator.*—See note 51 Am. Dec. 519-525.

(3) *Conclusiveness upon sureties of accounting, distribution, and judgment.*—The sureties upon the bond of an executor or administrator are, in the absence of fraud, concluded by the decree of the probate court, duly rendered upon a final settlement and accounting by their principal as to the amount of the principal's liability, although the sureties on the bond are not parties to the accounting. Such a decree can not be collaterally attacked.—*Greer v. McNeal*, 11 Okla. 526, 69 Pac. 893, 898; 11 Okla. 519, 69 Pac. 891; *Kenck v. Parchen*, 22 Mont. 519, 74 Am. St. Rep. 625, 57 Pac. 94; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714; *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125; *Chaquette v. Ortet*, 60 Cal. 594; *Treweek v. Howard*, 105 Cal. 434, 445, 39 Pac. 20; *Reither v. Murdock*, 135 Cal. 197, 198, 67 Pac. 784. But the probate court being one of only a limited jurisdiction, and its proceedings being regulated and governed entirely by statute, it can only settle the accounts of administrators or guardians in the manner prescribed by the code. If an administrator or guardian dies or absconds, or is beyond the jurisdiction of the court, the proper method, in order to ascertain whether he is liable, and to what extent, so as to bind the sureties on



his official bond, is by a proceeding in the nature of a civil action, wherein the sureties are made parties and have opportunity to be heard. If this is not done, neither the administrator nor his sureties are bound by the decree settling his account.—*Reither v. Murdock*, 135 Cal. 197, 201, 67 Pac. 784. So a decree of distribution of the estate of a deceased person fixes the liability of the executor or administrator, and, in the absence of fraud, is binding upon the representative and his sureties, although they were not made parties to the proceeding, and without regard to the fact as to whether an additional bond was given or not.—*Evans v. Gerken*, 105 Cal. 311, 313, 38 Pac. 725; *Treweek v. Howard*, 105 Cal. 434, 445, 39 Pac. 20; and if a person continues to act as executor, after his account is settled, and after a decree of partial distribution has been entered, he is answerable on his bond for a failure to pay over money, actually in his possession and under his control, until it is actually paid over pursuant to agreement.—*McCloud v. Hewlett*, 135 Cal. 361, 363, 369, 67 Pac. 333.

(4) **Breach of bond.**—The refusal or neglect of an executor or administrator to obey or to comply with the final judgment of the probate court rendered against him constitutes a breach of his bond, which provides that he "shall faithfully execute the duties of the trust, as such administrator, according to law," and renders him liable, as well as the sureties thereon, for the full amount of said judgment.—*Greer v. McNeal*, 11 Okla. 526, 69 Pac. 893, 898. His failure to account to the estate for certain moneys which came into his hands is a breach of his bond.—*McAllister v. People*, 28 Colo. 156, 63 Pac. 308. So his failure to make payment according to the directions of the court constitutes a breach of his bond, for which the sureties are answerable. But there is no breach until there is a failure to account, or to pay over the money as ordered.—*Chaquette v. Ortet*, 60 Cal. 594, 599; *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 718.

#### REFERENCES.

What constitutes a breach of the bond of an executor or administrator.—See note 51 Am. Dec. 525-534.

(5) **Sureties are liable for what.**—As the employment of an executor or administrator is a continuous one from the date of appointment until the close of the administration, and as he is answerable during such time for the faithful performance of his duties, he is liable for assets misapplied during such time, though the appropriation occurred before the execution of his bond.—*Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 718. Under the statute of Wyoming, the executor or administrator of a decedent becomes liable, with his sureties, for the faithful discharge of "all just debts and obligations" of the deceased, although there was a misapplication of funds of the estate, occurring after decedent's death.—*Snyder v. State*, 5 Wyo. 318, 63 Am. St. Rep. 60, 40 Pac. 441. An executor or administrator and his

sureties are answerable for damages, when the representative does what the law forbids, or fails to exercise reasonable care and diligence in doing what it enjoins. Thus they are answerable for money deposited in a bank by the administrator, where he allows it to remain after a time when, if he had performed his duty, it would have been distributed to those entitled, and is lost by the bank's failure.—*McNabb v. Wixom*, 7 Nev. 163. The sureties on the bond of an executor or administrator are answerable for the faithful execution, by the representative, of the duties of his trust, without regard to the time of the execution of the bond.—*Lacoste v. Splivalo*, 64 Cal. 35, 41, 30 Pac. 571. Where the bond executed by a surety of an administrator does not in terms limit his liability to the acts of the administrator after the execution of the instrument, but is general in terms, conditioned upon the faithful performance by the administrator of the duties of his trust, it is settled beyond controversy that, under such circumstances, the surety upon the bond of such administrator becomes liable for the breaches of trust of the administrator committed prior to his becoming such surety, as well as for those committed subsequent thereto.—*Elizalde v. Murphy*, 163 Cal. 681, 126 Pac. 978, 981. Where a special bond is given by an administrator to obtain an order to sell lands outside of the state and which order the court had no jurisdiction to make, the sale was made in his individual capacity, and the sureties on the bond are not liable to creditors of the estate as the proceeds of the sale of the lands are not available for payment of the debts of the estate.—*People v. Parker*, 54 Colo. 604, 132 Pac. 57.

(6) *Liability of sureties for personal debts of executor or administrator.*—Notwithstanding the fiction of law in California that money due from an administrator to the estate which he represents shall, as against him, be deemed money on hand, such legal fiction will not be allowed to work wrong and injustice. It may be that he will never have, at any time, in accounting as executor or administrator, the means to enable him to pay the debt, or any part thereof; and the rule now is, that the executor or administrator should not be charged for his personal debt to the estate beyond his actual ability to pay, for only to that extent does he, by his appointment, receive money from himself belonging to the estate.—*Estate of Walker*, 125 Cal. 242, 248, 73 Am. St. Rep. 40, 57 Pac. 991; *Sanchez v. Forster*, 133 Cal. 614, 65 Pac. 1077; *Estate of Thomas*, 140 Cal. 397, 73 Pac. 1059. The sureties upon an administrator's bond are in no sense guarantors of a debt owed by the administrator to the deceased in his lifetime. Section 1615 of the Code of Civil Procedure of California declares that "no executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault." This rule of law applies to the debt of an administrator, equally with that of any other person, and special restrictions upon executors, as declared in section 1447 of that code, are not made applicable to administrators.—*Sanchez v. Forster*, 133 Cal. 614, 615, 65 Pac.

1077. But in Oregon, where the single question presented on appeal was, whether the sureties on an executor's bond, who executed the same without knowledge of his indebtedness or his insolvency, were liable, under the decree of final distribution, for the amount of his personal debt to the estate, the court was of the opinion that there could be but one answer to the question, and that was, that they were liable. "It is common learning [knowledge]," said the court, "that the liability of the executor is coextensive with that of the principal," and the decree of the county or probate court, which binds the principal, will, in the absence of fraud or collusion, bind the surety. It follows, that when an executor has been charged, upon the settlement of his accounts, with a personal debt which he owed the deceased, whether by virtue of the statute, as in this state, or without a statute, as in other jurisdictions, the sureties on his bond are bound for the payment thereof, and the executor's insolvency or inability to pay is no defense.—United Brethren First Church, etc., v. Akin, 45 Or. 247, 2 Ann. Cas. 353, 66 Am. St. Rep. 654, 77 Pac. 748. Inasmuch as an administrator who is chargeable with a debt due from himself can not sue himself to enforce the same, and yet it being his official duty to collect and pay the same for the estate, he must be held officially liable for any money he could have applied thereon at any time during his official term. If he has not so applied it when able to do so, he has not faithfully discharged his trust according to law, and he and the sureties on his official bond may be held liable for the payment of the same. It is only as he had the means to pay that he and his sureties are chargeable with the money which ought to be in his hands.—In re Loheide, 17 Cal. App. 475, 120, Pac. 56.

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Liability of sureties on bond of executor or administrator for a debt of the representative owing to the estate.—See note 112 Am. St. Rep. 409-413. The matter of the liability of sureties on administration bonds in cases of judgments or decrees against their principal is discussed in the case of *Commonwealth v. Fidelity & Deposit Co.*, 132 Am. St. Rep. 764. Liability of surety on bond of executor or administrator for debt contracted in interest of estate.—See 22 L. R. A. (N. S.) 1094.

(7) *Sureties are not liable for what.*—The sureties on an administrator's bond are not answerable for his failure to account until the power of the court to secure the appearance of the administrator at a settlement has been exhausted, by the issuance of a citation demanding him to appear. It can not be assumed that the administrator would have failed to appear and to render an account had a citation been served upon him.—*Ashurst v. Fountain*, 67 Cal. 18, 6 Pac. 849. So where an administrator uses money in pursuance of an order of the probate court, having jurisdiction of the subject-matter and over the parties, in the payment of the costs of administration, and in

payment of the indebtedness against the estate, it is not only the right of the administrator to comply with the orders of the court, but it is also his duty, and he is not, nor are his bondsmen, answerable for such disbursement.—*Miller v. Baker*, 9 Kan. App. 883, 58 Pac. 1002, 1003. Neither is the administrator in his official capacity, nor are the sureties on his bond, answerable for the appropriation of the proceeds of a policy of life insurance payable to the executors or administrators of the decedent for the benefit of his wife, which were collected by the administrator and applied to the payment of debts of the estate. The sureties, under the terms of the contract, were answerable only for the faithful performance of such duties as were imposed by law on the administrator, as administrator of the estate of the deceased. If the proceeds of the insurance policy were received by the administrator as a trustee for the widow, and solely for her use, because of the terms of the agreement between the deceased and the insurance company, such proceeds were in no sense property of the estate, and were not received by him in the discharge of any official duties as administrator. The property was, in such event, the property of the widow, and the administrator was simply her agent or trustee in regard thereto. The sureties on his bond as administrator thereon had not undertaken to be answerable for the faithful performance of his duties as such agent or trustee, or for the faithful performance of any duties, except those relating to the administration of the decedent's estate. And the fact that persons interested in the estate may have profited by reason of the wrongful act of the administrator can not affect the question as to the liability of the estate.—*Nickals v. Stanley*, 146 Cal. 724, 725, 81 Pac. 117. In the case of a fraudulent sale of the estate of a decedent, made by the executor or administrator of the estate, the sureties are not answerable. The representative alone is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein.—*Weihe v. Statham*, 67 Cal. 245, 7 Pac. 673, 676.

(8) Joint liability. Subrogation. Contribution. Reimbursement.—There is no joint liability between the sureties on separate bonds of co-executors, and as there is no joint liability, there can be no right of contribution by one set of sureties against the others.—*Hewlett v. Beede*, 2 Cal. App. 561, 83 Pac. 1086, 1087. If one of several sureties dies, it is not improper to join his executor with some of the other sureties, in an action against another surety for contribution.—*Dussol v. Bruguiere*, 50 Cal. 456, 459. But if the principal dies, a judgment against the sureties is not enforceable by them as a claim against their principal's estate until they have paid it. Reimbursement can be claimed only for what has been expended.—*Estate of Hill*, 67 Cal. 238, 243, 7 Pac. 664. Sureties on an administrator's bond are usually entitled to be subrogated to the security held by the creditor; and in a case where the executor or administrator is indebted to the

estate which he represents, the sureties would succeed to the debt against the administrator.—*Estate of Walker*, 125 Cal. 242, 247, 73 Am. St. Rep. 40, 57 Pac. 991. The reimbursement to which an administrator is entitled on account of payments made for attorneys' fees, expenses, and for extraordinary services, is a right personal to himself, and one which he may waive; but if it could be said that this right of the principal on the bond to assert the claim is one to which the sureties might be subrogated, yet it must follow that such sureties would be restricted in the enforcement of such subrogated rights to the mode prescribed for their enforcement by the principal.—*Elizalde v. Murphy*, 4 Cal. App. 114, 116, 87 Pac. 245.

(9) **Release. Termination of liability. Discharge.** In general.—The power of the county court to relieve a surety on an administrator's or executor's bond from liability is purely statutory. After a bond has been given, the heir, legatee, or creditor of the estate acquires and has a vested interest in it, and the power of the court over it ceases, except in a proceeding authorized by law. When, therefore, an executor or administrator has given a bond for the performance of his duties as such, he can not, after it has been accepted and filed, upon his own motion, and to suit his own convenience or his own interest, apply for and obtain an order of the court setting it aside, discharging the sureties thereof, and substituting a new one in its stead. In many states the statutes provide that a surety may, on his own petition, and with notice to interested parties, obtain an order and be discharged from further liability upon an executor's or administrator's bond, but no such statute exists in Oregon. In that state there is a method provided by which a surety can be discharged or relieved, but it does not follow that because a county court in that state has power to compel an executor or administrator to give a bond, it also has power to cancel it and substitute another in its place. After the bond has been given, the power of the county court over it ceases, and the heirs, legatees, or creditors for whose security it was given have a vested interest therein, of which they can be deprived only by some proceeding known to the law. It is only when the amount of the executor's or administrator's undertaking is insufficient, or the sureties therein, or either of them, have become non-residents of the state, or are likely to or have become insolvent, that the county court may require a new bond, which will operate to discharge the sureties on the former undertaking from liability on account of their principal, arising from his acts or omissions subsequent thereto; and this proceeding is, by statute, wisely limited to cases where complaint is made by an heir, legatee, devisee, or creditor, or other person interested in the estate, and who have a vested interest in such undertaking or bond.—*Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 720. The entry of a conventional judgment and order in an action, whereby the remedies of the sureties are delayed and made to wait upon contingencies to which they have

never assented, and about which they have never been consulted, will release the sureties on an executor's bond from their liability.—*Fordyce v. Ellis*, 29 Cal. 96, 101.

(10) What does not release sureties.—Mere passive delay and forbearance on the part of the sureties of an executor or administrator in compelling him to account to the probate court does not discharge them from liability nor affect their obligation. The condition of their obligation is, that their principal will perform all the duties of executor or administrator, including that of rendering to the probate court, from time to time, such accounts of his administration as are required by law; and his failure to render such accounts is a dereliction of duty, for which his sureties are answerable, especially where they might have taken proceedings, under the statute, to procure their release from future responsibility, but failed to do so.—*Biggins v. Ralsch*, 107 Cal. 210, 213, 40 Pac. 333. Where the statute permits the obligee on the bond of an executor or administrator to sue any or all of the obligors, the dismissal of an action as to the principal, sued with a surety, does not release the surety. The situation is the same as though the action in the first instance had been brought by the obligee against the surety only.—*McAllister v. People*, 28 Colo. 156, 63 Pac. 308. Under the statute, the heirs at law are authorized to ask for "further security," and it is the duty of the court, whenever it comes to its knowledge that the bond of an executor or administrator is insufficient, to require him to file an "additional security"; and the giving of such bond does not affect the rights and liabilities of a surety upon the original bond, whether such additional bond was given by the representative voluntarily or after an order requiring him to file it.—*Elizalde v. Murphy*, 146 Cal. 168, 171, 79 Pac. 866. Section 1543 of the Civil Code of California declares that "a release of one of two or more joint debtors does not extinguish the obligation of any of the others." The provisions of this section are universal, and include all releases, whether resulting from operation of law or by virtue of a statutory provision, or by the direct act of the party with whom or for whose benefit the obligation was entered into.—*Elizalde v. Murphy*, 146 Cal. 168, 171, 79 Pac. 866. An order of the court, made on application of the heirs, releasing an insolvent surety on the bond of an administrator, and requiring the administrator to give additional security, does not release the co-surety's obligation on the original bond.—*Elizalde v. Murphy*, 146 Cal. 168, 171, 79 Pac. 866. Nor are the sureties on an administrator's bond released from liability by the neglect of a subsequent administrator of the estate of the decedent to collect from the former administrator a balance found to be due from him to the estate upon the settlement of his accounts.—*Estate of Connolly*, 73 Cal. 423, 424, 15 Pac. 56. If a decree in a probate proceeding has been entered, directing an executor to deposit certain money in a bank for the use and benefit of an heir, the executor can not be released and his bondsmen discharged until he has fully complied

with the decree of the probate court.—*Ehrngren v. Gronlund*, 19 Utah 411, 57 Pac. 268.

### 3. Action on bonds.

(1) *In general.*—In an action on the bond of an executor or administrator, the only matter triable is the validity of the bond sued on, and the liability of the sureties to the plaintiff. It is very doubtful whether the rights and liabilities of the defendants, as among themselves, can be determined, even upon issues framed for that purpose.—*Bellinger v. Thompson*, 26 Or. 320, 40 Pac. 229. In such an action the heirs are concluded as to all matters embraced in the final account of the representative, but not as to matters not embraced therein.—*Hartsel v. People*, 21 Colo. 296, 40 Pac. 567, 568. If a person has two characters,—that of executor and that of trustee,—the duties of one are separate and distinct from and independent of the other; and until he is discharged from the former, and has assumed the duties of the latter, his liability as executor still continues. A mere order of final settlement or distribution can not discharge him as executor, or relieve his bondsmen, until distribution is actually made; and if he has never qualified as trustee, he can not be regarded as having acted in any other capacity than that of executor. At all events, the sureties upon his bond as executor are, in an action thereon, estopped from asserting that he had ceased to be an executor, and was only a trustee, where he had never assumed the duties of trustee for the purpose of converting assets into cash and paying the proceeds over to a guardian.—*Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 718. So the sureties upon the bond of an executor or administrator are estopped from denying that the order appointing him was duly made and entered, where the bond recites that, by an order of the probate court "duly made and entered," the executor was appointed as such.—*Moore v. Earl*, 91 Cal. 632, 636, 27 Pac. 1087. Under the Colorado statute, actions may be maintained by the people of the state for the use of any person who may be injured by the conduct of the administrator or executor. But the statute gives strangers a right to sue on the bond only when they have sustained some damage which they show. When the plaintiff fails to prove that he had a claim against the estate, or that the administrator had received any assets, he is not injured by the misconduct of the administrator (in this case failure to file an inventory), and consequently he fails to establish the essential elements of a cause of action.—*Metz v. People*, 6 Colo. App. 57, 40 Pac. 51. Neither an administrator nor the sureties on his bond may be sued for a breach of his administrator's bond until there has been a settlement or final accounting in the county (probate) court and a decree entered therein showing a balance due, or some other breach of the conditions of the bond, and a failure on the part of the administrator to comply with such decree.—*Pennington v. Newman*, 36 Okla. 594, 129 Pac. 693.

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For instructive cases in general as to actions upon the bonds of executors or administrators, see *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714; *Rutenic v. Hamakar*, 40 Or. 444, 67 Pac. 196; *Greer v. McNeal*, 11 Okla. 526, 69 Pac. 893.

(2) Successive administrations. Actions against sureties of defaulting administrators and deceased administrators or co-executors.—A public administrator must procure letters of administration, like any other applicant. He is not an *ex officio* administrator of any estate. If a person's authority to administer upon an estate is derived solely by the grant of letters issued to him during his first term of office as public administrator, the fact that he afterwards succeeds himself as public administrator has nothing to do with the liability of the bondsmen for his first term, and may be treated as though it did not exist. He continues to be administrator of the estate after the expiration of his first term as public administrator, and it naturally follows that the sureties on his second official bond are not liable for the acts and omissions as administrator of any estate of which he became the representative before they executed their undertaking.—*O'Rourke v. Harper*, 35 Mont. 346, 89 Pac. 65, 66. An administrator *de bonis non* may maintain an action against a former administrator, who has been removed, as well as against the sureties on his administration bond, to recover the personal effects and assets of the estate unadministered, including the proceeds derived from a sale of the assets of the estate and converted by the former administrator, and also for his other maladministrations or omissions. The fact that no final accounting has been had with such administrator in the probate court does not deprive the district court of power to hear and determine such action, where the administrator has absconded from the state, and has been removed from office, and has failed to turn over the assets of the estate upon the order of the probate court. The assets of the estate are not to be regarded as administered until they have been collected and applied as required by law and the will of the testator; and when moneys of an estate have been misapplied or wrongfully paid out, the administrator *de bonis non* may recover from the defaulting administrator and his sureties the amount so misapplied, and also for the additional expense of administration made necessary by the default.—*Surety Co. v. Platt*, 67 Kan. 294, sub nom.; *American Surety Co. v. Platt*, 72 Pac. 775. If an administrator dies, leaving an unstated account, and there is no administration of his estate, a subsequent administrator may bring an action against the sureties on the bond of the deceased administrator to compel an accounting, and in such a case the sureties are the proper parties to make the settlement.—*Slater v. McAvoy*, 123 Cal. 437, 440, 56 Pac. 49. In such a case, jurisdiction to compel an accounting from the proper parties vests in the superior court as a court of equity, and it is not necessary, before bringing such suit, that the plaintiff pursue the personal representative of the



deceased administrator and compel from him a statement and settlement of the deceased administrator's account. It is not necessary that the account be settled in some other forum or in some other action before proceeding against the sureties.—*Slater v. McAvoy*, 123 Cal. 437, 439, 56 Pac. 49. See, also, *Chaquette v. Ortet*, 60 Cal. 594; *Zurfluh v. Smith*, 135 Cal. 644, 67 Pac. 1089. If a co-executor dies, leaving funds of the estate received by him unaccounted for, it is the duty of a surviving executor, as such, to sue his sureties for the recovery of such funds.—*Hewlett v. Beede*, 2 Cal. App. 561, 83 Pac. 1086, 1088. Where a fund subsequently claimed to be a trust fund came into the possession of a former administrator by virtue of his office, the sureties on his bond are liable to the estate after his death at suit of a succeeding administratrix, notwithstanding a suit to recover such fund from the estate was pending at his death.—*Elizalde v. Murphy*, 11 Cal. App. 32, 103 Pac. 904.

(3) *Leave to sue*.—Except in cases where the statute prescribes that application must first be made to the court and leave obtained to sue on the bond of an executor or administrator, no application for leave to bring such suit is necessary. The statute of the state of Washington, which provides that before any action shall be commenced by plaintiff, other than the state or municipality, against any public officer for official misconduct, does not apply to an action against an executor or administrator, as such representative is not a "public officer."—*Bartels v. Gove*, 4 Wash. 632, 30 Pac. 675.

(4) *Restriction upon action against sureties*.—No action can be maintained against the sureties of an executor, administrator, or guardian for breach of their bond until the amount of their indebtedness has been determined by order of the probate court.—*Nickals v. Stanley*, 146 Cal. 724, 726, 81 Pac. 117; *Cook v. Ceas*, 143 Cal. 221, 225, 77 Pac. 65; *Reither v. Murdock*, 135 Cal. 197, 198, 67 Pac. 784; *Chaquette v. Ortet*, 60 Cal. 594, 599; *Elizalde v. Murphy*, 4 Cal. App. 114, 118, 87 Pac. 245. An executor or administrator can not be sued on his bond until final settlement of his account, notwithstanding his removal for misconduct.—*Adams v. Petrain*, 11 Or. 304, 3 Pac. 163, 167. Nor can his sureties be held until their principal's liability is determined.—*Hamlin v. Kinney*, 2 Or. 92, 93. No action on the bond for a misappropriation of funds of the estate can be had until after an accounting made in the probate court, and the refusal of the representative to pay the amount adjudged against him.—*Weihe v. Statham*, 67 Cal. 84, 7 Pac. 143. Nor is an action maintainable on the bond of an executor or administrator, to recover for his neglect or misconduct in the sale of decedent's real estate unless the plaintiff has "suffered damage."—*Weihe v. Statham*, 67 Cal. 245, 7 Pac. 673, 676. Where the estate of a deceased person is in process of settlement in the probate court, and an accounting has not been had with a former executor therein, and there has been no refusal by such executor to make

a full and final accounting, and where a full settlement may be required and an adequate remedy had in that court, no occasion exists to invoke the equitable jurisdiction of the district court, or for interference by that court with the settlement in the probate court; and, in such a case, an action can not be maintained on the executor's bond until an accounting has been had in the proper tribunal, a liability ascertained, and an opportunity afforded the former executor to discharge it.—*Hudson v. Barratt*, 62 Kan. 137, 61 Pac. 737. An action upon the administrator's bond, in which it is sought to recover for alleged misconduct of, or appropriation of property by the administrator, will not lie until the remedies of the probate court have been exhausted; in other words until the probate court has found such misconduct or appropriation to exist, and the administrator has refused or neglected to comply with the orders of the probate court made upon such findings.—*Decker v. Decker*, 3 Alaska 123.

(5) *Parties*.—Where a deceased administrator had, in his lifetime, and as such administrator, collected a life-insurance policy made payable by assignment to the executor, administrator, or assigns of the deceased policyholder, the beneficiary of the policy is the real party in interest; and a suit may be brought in his name, under the code, against the sureties upon the administrator's bond, to recover the proceeds collected upon the policy.—*Conway v. Carter*, 11 N. M. 419, 68 Pac. 941. In an action against a representative purely as administrator, his sureties are not proper parties defendant.—*Nickals v. Stanley*, 146 Cal. 724, 726, 81 Pac. 117; but in an action to compel the sureties of a deceased administrator to account, where there is no administration of his estate, the sureties are proper parties defendant.—*Slater v. McAvoy*, 123 Cal. 437, 440, 56 Pac. 49. A deceased principal's personal representative may be joined with the surviving co-obligors in an action on the bond.—*Lawrence v. Doolan*, 68 Cal. 309, 5 Pac. 484.

(6) *Pleadings*.—Where the complaint in an action on an executor's bond alleges that the executor was appointed; that letters testamentary were directed to be issued to him upon his "executing a bond according to law," etc.; and that the executor and the appellants "duly made and executed the bond required by said order,"—it is not open to the objection that it does not allege that the bond sued on was approved by the judge, or was ever filed or recorded, or that any certificate of justification was attached thereto. The allegations are sufficient to meet the requirements of the statute, certainly as against a general demurrer.—*Evans v. Gerken*, 105 Cal. 311, 315, 38 Pac. 725. In an action to recover assets of the estate from an administrator, who has been removed, and who refuses to turn over to his successor the property and moneys of said estate, the complaint sufficiently alleges a breach of the condition of the bond, and states facts sufficient to constitute a cause of action, where it alleges that the order removing the administrator required him, upon

demand, to turn over to the successor all property and moneys belonging to said estate; that a designated person was appointed as such successor, and, having duly qualified as such administrator, he demanded of the removed administrator all of the money in his possession belonging to said estate; but that he refused and still neglects to pay over any part thereof.—*Rutinic v. Hamakar*, 40 Or. 444, 67 Pac. 196, 200. Where a complaint in an action against an administrator and sureties on his bond contains several counts, it is not necessary to repeat at length, in each of the succeeding counts of the complaint, the facts stated in the first count and leading up to the decree of distribution, where the reference made to the preceding count is definite and certain.—*Treweek v. Howard*, 105 Cal. 434, 441, 39 Pac. 20. In a suit against an administrator and the sureties on his bond for moneys alleged to have been lost by failure and refusal of the administrator, for nineteen months after his appointment, to file his final account, and to distribute the estate, the mere failure on the part of defendants to deny the demand and refusal does not admit the conversion alleged.—*McNabb v. Wixom*, 7 Nev. 163, 174.

(7) Defense. What is and what is not.—In an action on the bond of an executor or administrator for misappropriation of moneys of the estate, which he failed to pay over to the distributees, it is not a good defense that such money was not a part of the personal property or income of the estate, but was derived from the sale of realty belonging to the estate, which the executor had been permitted, by the neglect and failure of the superior court and plaintiff, to sell without giving the additional bond required by law, and without the consent of the sureties of defendant that said realty should be sold without such additional bond being given. Such a defense may properly be stricken out as irrelevant and redundant.—*Evans v. Gerken*, 105 Cal. 311, 313, 38 Pac. 725. It is no defense for the sureties, in such an action, that the executor had, during the lifetime of the testator, and while acting as an agent, embezzled money of the testator, and that the sureties on his bond were ignorant of that fact, as well as of his insolvency.—*Treweek v. Howard*, 105 Cal. 434, 446, 39 Pac. 20. Nor does the neglect of a succeeding administrator to recover a balance found to be due, from a former administrator, to the estate upon the settlement of his accounts, constitute a defense for the sureties on the bond of the former administrator.—*Estate of Connolly*, 73 Cal. 423, 15 Pac. 56. It is no defense, in an action on the bond of an executor or administrator to recover money which he has been ordered to turn over to his successor in office, that he has applied money in satisfaction of the debt of the estate to him, where the estate is insolvent. To permit such a defense would have the effect of disturbing the ratable distribution of the fund arising from the sale of the decedent's property to which each of the creditors is entitled. In any event, the representative, under such circumstances, is not entitled

to the payment of his claim in full.—*Rutenic v. Hamakar*, 40 Or. 444, 67 Pac. 196, 201. But the sureties, in such an action, may show, in defense, that the bond was not made, or that the decree was not made, or if made, that the same has been obeyed, or that it was obtained by collusion or fraud; but they can not show that the court has erred in making the decree, or that no assets ever came into the possession of the representative.—*Irwin v. Backus*, 25 Cal. 214, 224, 85 Am. Dec. 125.

(8) Evidence.—Proceedings fixing the liabilities of sureties on the bond of an executor or administrator are admissible in evidence in an action on such bond.—*Irwin v. Backus*, 25 Cal. 214, 224, 85 Am. Dec. 125. The fact that an administrator de bonis non was permitted to testify that the administrator, at the time of the former's appointment, handed to him, as his successor, a book in which were kept the administrator's accounts, and that the administrator de bonis non was permitted to testify therefrom, without introducing the book in evidence, is not prejudicial, even if it be considered erroneous.—*McAllister v. People*, 28 Colo. 156, 63 Pac. 308, 309.

(9) Judgment.—If the allegations of the complaint in an action on the bond of a deceased executor or administrator are sufficient to warrant a recovery, and the answer and cross-complaint of the defendant surety admit all the allegations of the complaint, except the allegation that the deceased administrator was insolvent at the time of his death, which was denied, it is not error for the court to render judgment for the plaintiff upon the pleadings on plaintiff's motion; issues sought to be raised by the answer and cross-complaint being immaterial. In such a case, a cross-complaint by the defendant surety, alleging that the deceased administrator died seised of real estate, and praying that the court order the sale of the same, apply the proceeds to the payment of the debts of the other creditors, and that suit on the bond be stayed pending such proceedings, is no bar to the plaintiff's recovery upon the pleadings, notwithstanding the cross-complaint.—*Conway v. Carter*, 11 N. M. 419, 68 Pac. 941. The question whether a judgment of a creditor of the estate against the administrator de bonis non is conclusive against the sureties becomes immaterial, where such judgment was not treated as conclusive, and testimony was received as to the merits of the claim on which the judgment was rendered.—*Surety Co. v. Piatt*, 67 Kan. 294, sub nom.; *American Surety Co. v. Piatt*, 72 Pac. 775. Where an executor or administrator has received money, which came into his hands by virtue of his trust, the estate, in an action against him and his sureties, is entitled to interest on such money, and the court is authorized to give judgment for such interest.—*Rutenic v. Hamakar*, 40 Or. 444, 67 Pac. 196, 201. The sureties on an administrator's bond can not collaterally attack a judgment of the probate court against the administrator upon a final settlement and accounting by their principal, for whose fidelity to his trust they have obligated themselves.—*Greer v. McNeal*, 11

Okl. 526, 69 Pac. 893. A judgment entered by a county court of this state upon the final accounting of an executor is conclusive as against the bondsmen as well as the executor, and, as against the bondsmen, imports verity, and is not merely *prima facie* evidence of its contents. Such judgment is not a judgment against mere indemnitors; hence the fact that the bondsmen were not present, and were not made parties to the accounting, does not invalidate the judgment as against the bondsmen.—Joy v. Elton, 9 N. D. 428, 83 N. W. 875.

#### REFERENCES.

A judgment against an executor or administrator, how far conclusive on the sureties.—See note 32 Am. Dec. 202-204.

(10) *Limitations of actions.*—The statute of the state of Washington, which provides that an action by an heir, legatee, creditor, or other party interested, against an executor or administrator, for alleged misfeasance, malfeasance, or mismanagement of the estate, must be commenced within one year from the time of final settlement, or from the time such alleged misconduct was discovered, has reference to the settlement of the accounts of every intermediate administrator that there might happen to be in the progress of the settlement of the estate. Hence the limitation does not apply in an action by an administrator *de bonis non* against a former administrator, to recover an amount alleged to be due from such former administrator to the plaintiff, claiming the property as such new administrator.—Bartels v. Gove, 4 Wash. 632, 30 Pac. 675. If the assets of an estate are lost, in part, through an executor's negligence, he becomes jointly liable with his co-executor, and also severally, and if the heir ignores the joint liability, as he has a right to, and sues the defaulting executor, without joining the sureties of his co-executor, and recovers judgment, which the defaulting co-executor pays, and the defaulting co-executor, in his individual capacity, seeks to recover from the sureties of the other co-executor what he was compelled to pay the heir, the heirs no longer have any concern in the question whether the defendant may default or not, for they have received the estate, and the matter becomes a purely personal one between the two co-executors as individuals, and the plaintiff's cause of action is barred, if not brought within four years from the time that the estate was rightfully demanded by the heir.—Hewlett v. Beede, 2 Cal. App. 561, 568, 569, 83 Pac. 1086.

(11) *Appeal.*—In an action on the official bond of an executor or administrator, sureties who are benefited by the judgment, not being aggrieved, have no right to complain thereof.—McCloud v. Hewlett, 135 Cal. 361, 365, 67 Pac. 333. On appeal, the action of the probate court in ascertaining the value of the estate, and fixing the amount of the administrator's bond, will not be reviewed.—Lucas v. Todd, 28 Cal. 182, 187. In such actions, objections not raised in the court below will not be considered for the first time on appeal.—Bellinger v. Thompson, 26 Or. 320, 37 Pac. 714, 720.

## CHAPTER VII.

## SPECIAL ADMINISTRATORS, AND THEIR POWERS AND DUTIES.

- § 315. Special administrator, when appointed.
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- § 317. Form. Order appointing special administrator.
- § 318. Special letters may issue at any time.
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- § 320. Form. Clerk's certificate that special letters of administration have been recorded.
- § 321. Preference given to persons entitled to letters.
- § 322. Special administrator to give bond and take oath.
- § 323. Form. Bond of special administrator.
- § 324. Special administrator; duties of.
- § 325. Special administrator's powers cease when.
- § 326. Special administrator to render account.
- § 326.1 Payment, by special administrators, of secured debts.

## SPECIAL ADMINISTRATORS.

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|--|---|
| 1. Nature of duties.                     | (2) For money and interest.               |
| 2. Appointment and jurisdiction.         | (3) For taxes.                            |
| (1) In general.                          | (4) For profits.                          |
| (2) Power to appoint.                    | 5. Reimbursement. Compensation.           |
| (3) Executor's right to.                 | 6. Actions by and against.                |
| (4) Preference.                          | (1) In general.                           |
| (5) Appointment is unauthorized when.    | (2) Costs and expenses.                   |
| (6) Presumption in favor of appointment. | 7. Appeal.                                |
| (7) Right to object to appointment.      | (1) Whether appeal lies.                  |
| (8) Jurisdiction of court.               | (2) Presumption.                          |
| 3. Powers of.                            | (3) Stay of proceedings.                  |
| 4. Accounting.                           | (4) Considerations for appellate court.   |
| (1) In general.                          | (5) Affirming disallowance of claim paid. |

## § 315. Special administrator, when appointed.

When there is delay in granting letters testamentary or of administration from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended, or removed, the superior court, or a judge thereof, must appoint a special administrator to collect

and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate.—*Kerr's Cyc. Code Civ. Proc.*, § 1411.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1612.
- Arizona—Revised Statutes of 1913, paragraph 827.
- Colorado—Mills's Statutes of 1912, section 7908.
- Idaho\*—Compiled Statutes of 1919, section 7526.
- Kansas—General Statutes of 1915, section 4499.
- Montana—Revised Codes of 1907, section 7470.
- Nevada—Revised Laws of 1912, section 5926.
- New Mexico—Statutes of 1915, section 2228.
- North Dakota—Compiled Laws of 1913, section 8667.
- Oklahoma—Revised Laws of 1910, section 6282.
- Oregon—Lord's Oregon Laws, section 1156.
- South Dakota—Compiled Laws of 1913, section 5744.
- Utah—Compiled Laws of 1907, sections 3821, 3975.
- Washington—Laws of 1917, chapter 156, page 662, section 81.
- Wyoming—Compiled Statutes of 1910, section 5506.

#### § 316. Form. Petition for appointment of special administrator.

[Title of court.]

[Title of estate.]

{ Department No. —.  
[Title of form.]

To the Honorable the — <sup>1</sup> Court of the County <sup>2</sup> of —,  
State of —.

State the jurisdictional facts, names, ages, and residences of heirs, value and character of property, and search for and failure to find a will, as in § 221, and then allege:

That there has been delay in the granting of letters of administration upon said estate; that there will probably be a longer delay before letters are granted; and that it is necessary that some one be authorized to collect, take charge of, and preserve said estate,—

Wherefore your petitioner prays that he be appointed special administrator of said estate. —, Petitioner.  
—, Attorney for Petitioner.

Explanatory notes.—1 Title of court. 2 Or, city and county.

**§ 317. Form. Order appointing special administrator.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.] }

Good cause being shown therefor, and on motion of —, it is ordered by the court, That — be, and he is hereby, appointed special administrator<sup>2</sup> of the estate of —, deceased, late of the county<sup>3</sup> of —, state of —, and that as such special administrator,<sup>4</sup> he shall have power to collect and preserve all the personal property of said estate, in whatever county or counties the same may be found, and all the income, issues, rents, and profits of the real and personal property of said estate, and all claims and demands of the estate, and take charge of and manage the real estate, and preserve the same from damage, waste, and injury, and commence, maintain, and defend all suits and other legal proceedings necessary to carry out these powers; that he give bond, as such special administrator,<sup>5</sup> in the sum of — dollars (\$—), and that thereupon letters of administration issue to him in conformity with this order.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 Or, administratrix. 3 Or, city and county. 4, 5 Or, administratrix.

**§ 318. Special letters may issue at any time.**

The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue



letters of administration to such person in conformity with the order.—*Kerr's Cyc. Code Civ. Proc.*, § 1412.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 828.

Colorado—Mills's Statutes of 1912, section 7908.

Idaho\*—Compiled Statutes of 1919, section 7527.

Montana\*—Revised Codes of 1907, section 7471.

Nevada—Revised Laws of 1912, section 5927.

Oklahoma—Revised Laws of 1910, section 6283.

South Dakota—Compiled Laws of 1913, section 5745.

Utah—Compiled Laws of 1907, section 3822.

Wyoming\*—Compiled Statutes of 1910, section 5507.

#### § 319. Form. Special letters of administration.

[Title of court.]

[Title of estate.]

{ Department No. —.  
[Title of form.]

State of —, }  
County <sup>1</sup> of —, } ss.

— is hereby appointed special administrator <sup>2</sup> of the estate of —, deceased, to collect and take charge of the estate of said deceased, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of said estate.

Witness, —, clerk of the — court in and for the county <sup>3</sup> of —, with the seal of said court affixed, this — day of —, 19—.

By order of the court.

—, Clerk.

[Seal]

By —, Deputy Clerk.

Explanatory notes.—<sup>1</sup> Or, City and County. <sup>2</sup> Or, administratrix. <sup>3</sup> Or, city and county. The oath, which is substantially the same as that required of an ordinary executor or administrator, as shown in §§ 234, 237, ante, must be attached to the letters. and the letters must be recorded. See § 275, ante.

**§ 320. Form. Clerk's certificate that special letters of administration have been recorded.**

[Title of court.]

[Title of estate.]

{ Department No. —.  
[Title of form.] }

State of —, }  
County <sup>1</sup> of —, } ss.

I, —, county clerk of the county <sup>2</sup> of —, and ex officio clerk of the — <sup>3</sup> court thereof, do hereby certify the foregoing to be a full and correct copy of the special letters of administration in the matter of the estate of —, deceased, now on file and of record in my office; and I further certify that the same have not been revoked or vacated, but are still of full force and effect.

Witness my hand and the seal of said court this — day of —, 19—.

[Seal]

By —, Deputy Clerk.

Explanatory notes.—1, <sup>2</sup> Or, City and County. <sup>3</sup> Title of court.

**§ 321. Preference given to persons entitled to letters.**

In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.—*Kerr's Cyc. Code Civ. Proc.*, § 1413.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 829.

Colorado—Mills's Statutes of 1912, section 7908.

Idaho\*—Compiled Statutes of 1919, section 7528.

Montana\*—Revised Codes of 1907, section 7472.

Nevada\*—Revised Laws of 1912, section 5928.

North Dakota—Compiled Laws of 1913, section 8669.

Oklahoma\*—Revised Laws of 1910, section 6284.

South Dakota\*—Compiled Laws of 1913, section 5746.

Utah—Compiled Laws of 1907, section 3823.

Wyoming\*—Compiled Statutes of 1910, section 5508.

**§ 322. Special administrator to give bond and take oath.**

Before any letters issue to any special administrator, he must give bond in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge conditioned for the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters.—*Kerr's Cyc. Code Civ. Proc.*, § 1414.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 830.

Idaho\*—Compiled Statutes of 1919, section 7529.

Kansas—General Statutes of 1915, section 4500.

Montana\*—Revised Codes of 1907, section 7473.

New Mexico—Statutes of 1915, section 2230.

Oklahoma\*—Revised Laws of 1910, section 6285.

South Dakota\*—Compiled Laws of 1913, section 5747.

Utah\*—Compiled Laws of 1907, section 3824.

Washington—Laws of 1917, chapter 156, page 663, section 82.

Wyoming\*—Compiled Statutes of 1910, section 5509.

**§ 323. Form. Bond of special administrator.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

Know all men by these presents, That we, — as principal, and — and — as sureties, are held and firmly bound to the state of —, in the sum of — dollars (\$—), lawful money of the United States of America to be paid to the said state of —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that, whereas — has been appointed special administrator of the estate of —, deceased, —

Now, therefore, if the said — shall faithfully execute the duties of his trust according to law, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this — day of  
 —, 19—. — [Seal]  
 — [Seal]  
 — [Seal]

Explanatory notes.—1 Give file number, if possible. This bond must be recorded. See § 275, ante.

**§ 324. Special administrator; duties of.**

The special administrator must collect and preserve for the executor or administrator, all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues and profits, claims and demands of the estate; must take the charge and management of, enter upon, and preserve from damage, waste and injury, the real estate, and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator; he may sell such perishable property as the court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent. The special administrator may commence and maintain all proceedings, do all acts, and apply for and obtain all orders and decrees, authorized and provided for, in or by article five of chapter seven of title eleven of part third of this code, in the same manner and with like effect as an executor or administrator.—*Kerr's Cyc. Code Civ. Proc.*, § 1415.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

- Arizona—Revised Statutes of 1913, paragraph 831.
- Colorado—Mills's Statutes of 1912, section 7908.
- Idaho—Compiled Statutes of 1919, section 7530.
- Kansas—General Statutes of 1915, sections 4501, 4502.
- Montana—Revised Codes of 1907, section 7474.
- Nevada—Revised Laws of 1912, section 5929.
- New Mexico—Statutes of 1915, section 2228.
- North Dakota—Compiled Laws of 1913, section 8670.
- Oklahoma—Revised Laws of 1910, section 6286.
- South Dakota—Compiled Laws of 1913, section 5748.

Utah—Compiled Laws of 1907, section 3825.

Washington—Laws of 1917, chapter 156, page 663, section 83.

Wyoming—Compiled Statutes of 1910, section 5510.

**§ 325. Special administrator's powers cease when.**

When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator.—*Kerr's Cyc. Code Civ. Proc.*, § 1416.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1612.

Arizona\*—Revised Statutes of 1913, paragraph 832.

Idaho\*—Compiled Statutes of 1919, section 7531.

Kansas—General Statutes of 1915, section 4502.

Montana\*—Revised Codes of 1907, section 7475.

Nevada\*—Revised Laws of 1912, section 5930.

New Mexico—Statutes of 1915, section 2228.

North Dakota—Compiled Laws of 1913, sections 8671, 8801.

Oklahoma\*—Revised Laws of 1910, section 6287.

Oregon—Lord's Oregon Laws, section 1156.

South Dakota\*—Compiled Laws of 1913, section 5749.

Washington—Laws of 1917, chapter 156, page 663, section 84.

Wyoming\*—Compiled Statutes of 1910, section 5511.

**§ 326. Special administrator to render account.**

The special administrator must render an account, on oath, of his proceedings in a like manner as other administrators are required to do. He is entitled to a reasonable compensation for his services, to be fixed by the court at the time of the settlement of his final account.—*Kerr's Cyc. Code Civ. Proc.*, § 1417.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 833.

Idaho—Compiled Statutes of 1919, section 7532.

Montana—Revised Codes of 1907, section 7476.

Nevada—Revised Laws of 1912, section 5931.

Oklahoma—Revised Laws of 1910, section 6288.

South Dakota—Compiled Laws of 1913, section 5750.

Washington—Laws of 1917, chapter 156, page 663, section 86.

Wyoming—Compiled Statutes of 1910, section 5512.

**§ 326.<sup>1</sup> Payment, by special administrators, of secured debts**

If it shall appear by the verified petition of any special administrator, or other person interested in any estate in the charge of any special administrator, that any of the property of said estate is subject to any mortgage, lien or deed of trust, to secure the payment of money, and that any amount so secured, either principal or interest, is past due and unpaid; that the holder of the security threatens or is about to enforce or foreclose the same and that the said property exceeds in value the amount of the entire obligation thereon, and an order is asked directing or permitting said special administrator to pay all or any part of the amount so secured, the court or a judge thereof shall fix a time for the hearing of said petition and shall direct notice of not less than ten days to be given by posting in three public places and by personal service on all parties who have appeared or their attorneys. At the time so appointed, if the allegations of such petition shall be proven to the satisfaction of the court and it shall appear to be for the best interests of said estate, the court may order the special administrator to pay interest or other portions or the whole of the secured debt, and, in its discretion, may direct the special administrator to take proceedings under article five of chapter seven of title eleven of this code to secure funds for such purpose. Any such order for payment of interest may also direct that interest not yet accrued be paid as it becomes due and such order shall remain in effect and cover such future interest until and unless thereafter for good cause set aside or modified by the court upon similar petition and notice to that hereinabove provided.—*Kerr's Cyc. Code Civ. Proc.*, § 1418.

## SPECIAL ADMINISTRATORS.

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|--|---|
| 1. Nature of duties.                     | (2) For money and interest.               |
| 2. Appointment and jurisdiction.         | (3) For taxes.                            |
| (1) In general.                          | (4) For profits.                          |
| (2) Power to appoint.                    | 5. Reimbursement. Compensation.           |
| (3) Executor's right to.                 | 6. Actions by and against.                |
| (4) Preference.                          | (1) In general.                           |
| (5) Appointment is unauthorized when.    | (2) Costs and expenses.                   |
| (6) Presumption in favor of appointment. | 7. Appeal.                                |
| (7) Right to object to appointment.      | (1) Whether appeal lies.                  |
| (8) Jurisdiction of court.               | (2) Presumption.                          |
| 3. Powers of.                            | (3) Stay of proceedings.                  |
| 4. Accounting.                           | (4) Considerations for appellate court.   |
| (1) In general.                          | (5) Affirming disallowance of claim paid. |

1. Nature of duties.—The office and duties of a special administrator are very similar to those of a receiver in equity. Each is appointed by the court to take charge, under its directions, of property in litigation, or which is involved in the proceedings before it, with a view to its care and preservation for the parties to whom the court may ultimately decide that it belongs. The powers and duties of each are special, and limited to such as are defined by statute, or expressed in the order of his appointment, or which he may from time to time receive for the purpose of more effectually preserving the estate intrusted to his charge.—*Estate of Moore*, 88 Cal. 1, 3, 25 Pac. 915. The statutes of the state of Washington cover only such debts and choses in action as may be assets of the estate. The only object of appointing a special administrator is to preserve the assets pending a formal administration and the matter of debts owing by the deceased is nowhere mentioned in the sections and it is not to be presumed that the legislature intended to leave the right to present a claim to a special administrator concealed in words of doubtful meaning.—*Ward v. Magaha*, 71 Wash. 679, 129 Pac. 396. It being clear upon principle and authority that a special administrator has no power to pay claims against the estate, it follows that he has no authority to allow or reject them.—*Ward v. Magaha*, 71 Wash. 679, 129 Pac. 396.

## 2. Appointment and jurisdiction.

(1) In general.—Under a statute which authorizes the appointment of a special administrator, at any time and without notice, such an appointment is valid, whether made by the court or by a judge at chambers.—*Raine v. Lawlor*, 1 Cal. App. 483, 485, 82 Pac. 688. The appointment must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. But the court has no power to appoint a special administratrix where letters testamentary have been issued to an executrix who has never been suspended or removed.—*Schroeder v. Superior Court*, 70 Cal. 343, 344, 11 Pac. 651. The fact that a co-administrator has been misnamed

"special administrator" does not vitiate the appointment of a special administrator.—*Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 682. The failure of the clerk to enter the minutes as required by section 1412 of the Code of Civil Procedure of California, held not fatal, the appointment being complete when the order was signed.—*McNeill v. Morgan*, 157 Cal. 373, 108 Pac. 69.

(2) **Power to appoint.**—The probate court has ample power to protect the estate, during a vacancy in the administration, by the appointment of a special administrator, whose proceedings are subject to its control and supervision.—*Chapman v. Hollister*, 42 Cal. 462, 464. The court has power to appoint a special administrator to act during the period of suspension of the regular administrator, but not to appoint a general administrator until such order of suspension or of removal becomes final.—*Estate of Moore*, 86 Cal. 72, 24 Pac. 846. In making the appointment of a special administrator of an estate, the court has only a limited jurisdiction over the estate. It has jurisdiction alone for the special purposes of that character of administration, and gains no power, by a proceeding which results in the appointment of a special administrator, to appoint a general administrator.—*Estate of Damke*, 133 Cal. 433, 65 Pac. 888, 889. The jurisdiction of the court to appoint a special administrator is not affected by an insufficient showing made for such appointment, as this is a mere irregularity.—*State v. Ayer*, 17 Wash. 127, 49 Pac. 226, 227. As the court should postpone an application for letters of administration on the estate of a decedent, who left a will, until the validity of the will has been determined, it may appoint a special administrator to care for the estate until that question has been determined. It is the simple case of the delay in granting letters testamentary or of administration.—*Estate of Edwards*, 154 Cal. 91, 97 Pac. 23, 24. If an order is made revoking the probate of a will, an appeal from such order does not revive the powers and functions of the former executor; and the court, therefore, has jurisdiction to appoint a special administrator.—*Estate of Crozier*, 65 Cal. 332, 334, 4 Pac. 109. The superior court having jurisdiction over the estate of a deceased person has power to appoint a special administrator in lieu of a regular administrator, upon the suggestion of disability of the latter, and to empower the special administrator to maintain and defend suits.—*McNeill v. Morgan*, 157 Cal. 373, 108 Pac. 69.

(3) **Executor's right to.**—A person named as executor in a will is, in a case where it is necessary to appoint a special administrator, entitled to the appointment.—*In re Williams' Estate*; *Scott v. Davis*, 55 Mont. 63, 173 Pac. 790.

(4) **Preference.**—In selecting a person to act as special administrator the court or judge is expressly required by the statute of Montana to give preference to the person who is entitled to letters testamentary or of administration.—*State v. District Court*, 49 Mont. 146, 140 Pac.



733. If the court or judge refuses to accord the preference given by section 7472 of the Rev. Codes of Montana, in making the appointment of a special administrator, it is, in the absence of a showing of incompetency, under section 7436 of the Revised Codes of that state, a direct violation of the law.—*State v. District Court*, 49 Mont. 146, 148, 140 Pac. 732.

(5) *Appointment is unauthorized when.*—In the absence of any legal cause for the appointment of a special administrator, the court has no jurisdiction to appoint one; and where there is no such cause, the court violates the statute in appointing the public administrator as special administrator in preference to others who are first entitled to such appointment.—*State v. District Court*, 34 Mont. 226, 85 Pac. 1022, 1023. Under a statute which provides that the probate court must give preference to the person entitled to letters testamentary or of administration, where a special administrator is appointed, the court has no power to appoint the public administrator as special administrator upon the removal of the original administrator, as against the application of one who is entitled to priority of appointment under the statute.—*In re Ming*, 15 Mont. 79, 38 Pac. 228, 232. Pending an appeal from a judgment setting aside the probate of a will, it is error to appoint the executor therein named as special administrator of the estate.—*Hartley v. Lord*, 38 Wash. 432, 80 Pac. 554. A statute which provides for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined, or otherwise unlawfully done away with," is invalid, as depriving the person of his property and its possession without notice or due process of law, when applied to the property of a person living, although such special administrator has no power to administer such estate generally. The taking of possession of the property of such person under letters of administration issued without notice is not such notice to the owner as will validate the proceedings. Nor can the taking of possession of a person's property, under such circumstances, be upheld as a proper exercise of the police power of the state. And it follows that costs and disbursements incurred by such special administrator, though acting in good faith, are not a legal charge against such person or his property, as the proceedings are wholly void.—*Clapp v. Houg*, 12 N. D. 600, 102 Am. St. Rep. 589, 65 L. R. A. 757, 98 N. W. 710.

(6) *Presumption in favor of appointment.*—In administration proceedings to appoint a special administrator, the presumption is that the facts authorized the court to make the appointment, although the order granting such letters does not show the removal, suspension, or resignation of another administrator.—*Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 683, 685. An order granting letters of special administration

can not be held void in a collateral proceeding because it does not show the removal, suspension, or resignation of the prior administrator. In addition to the general presumption of regularity attaching to the orders of the court, the statute expressly dispenses with the necessity of a showing of facts essential to jurisdiction by recital in the order or decree.—*Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 682, 685.

(7) *Right to object to appointment.*—The fact that a testator's widow asked that she be appointed special administratrix of the testator's estate does not estop her from objecting to the appointment of another person as special administrator in a case where the court has no jurisdiction to appoint any one to that office.—*State v. District Court*, 34 Mont. 226, 85 Pac. 1022, 1023. Where the appointment of a special administrator was made with the consent and in the presence of the original administratrix, who was the only party interested, representing in herself and as guardian all the heirs of the estate, and the rights of creditors not being involved, she is not in a position to complain of such appointment on the ground that the order appointing the special administrator did not show the removal, suspension, or resignation of the prior administrator.—*Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 682, 685.

(8) *Jurisdiction of court.*—Where no written application for letters of administration has ever been filed, the court is without jurisdiction to make an order appointing a special administrator.—*Scott v. Superior Court*, 30 Cal. App. 793, 159 Pac. 225. The functions of a special administrator are limited to those called for by order appointing him, and there must be a general administrator appointed in order that the court may have jurisdiction to order a distribution.—*Estate of Davis*, 175 Cal. 198, 165 Pac. 525, 527.

3. *Powers of.*—The paramount duty of a special administrator is to collect all the personal estate of the deceased, and to preserve the same for the general executor or administrator when appointed. The statutes limit the function of a special administrator to the exercise of powers necessary to collect and to preserve the estate for the executor or administrator to be regularly appointed. The enumeration of particular facts, such as to sell such perishable property as may be ordered sold, and to collect rents, etc., is but to enable a special administrator to collect and to preserve what otherwise might not be collected and preserved for the estate by any one in authority. The authority "to exercise such other powers as are conferred upon him by his appointment" is but a further power to what may be necessary to collect and to preserve. It is not a power to exercise the power and duties conferred upon a regular executor or administrator, such as the allowance of payment of claims.—*State v. Second Jud. Dist. Ct.*, 18 Mont. 481, 46 Pac. 259, 261. A court of probate therefore has no power to order a special administrator to pay any claims in advance of general administration.—*State v. Second Jud. Dist. Ct.*, 18 Mont. 481, 46 Pac. 259, 261. A special administrator can not pay the debts of the estate,

nor limit the time for the presentation of claims by any notice which he may give.—*In re Ford's Estate*, 29 Mont. 283, 74 Pac. 735, 737; *Estate of Sackett*, 78 Cal. 300, 20 Pac. 863. He has no power to have appraisers appointed.—*In re Ford's Estate*, 29 Mont. 283, 74 Pac. 735, 737. If a special administrator, without authority, and as such administrator, sells stock of a corporation which had been pledged to his decedent during the latter's lifetime, as security for a loan, the sale is not such a conversion by the estate as will enable the pledgor to recover the enhanced value of the stock in an action of trover against the executors subsequently appointed, although the proceeds of such sale were paid over to the executors.—*Von Schmidt v. Bourn*, 50 Cal. 616, 618. Section 1415 of the Code of Civil Procedure of California appears under any fair and reasonable construction to authorize the commencement and maintenance by the special administrator, when authorized by the order of court appointing him, of any suit or legal proceeding that might be commenced or maintained by the general administrator or executor.—*Ruiz v. Santa Barbara Gas & Electric Co.*, 164 Cal. 188, 128 Pac. 330, 332. If the special administrator is authorized to commence an action, the general administrator is entitled to be substituted as plaintiff. Section 1416 of the Code of Civil Procedure of California provides that the powers of the special administrator cease upon the granting of letters testamentary or of administration, and that "the executor or administrator may prosecute to final judgment any suit commenced by the special administrator."—*Ruiz v. Santa Barbara Gas & Electric Co.*, 164 Cal. 188, 128 Pac. 330, 331. A special administrator is entitled to the exclusive control over the estate for the time being, and until he is displaced by the appointment and qualification of the executor or general administrator.—*Murphy v. Nett*, 51 Mont. 82, L. R. A., 1915E, 797, 149 Pac. 713. The office of special administrator is one specially created by statute, with limited tenure and limited powers; thereby the functions of a special administrator are limited to the exercise of such powers only as are necessary to collect and to preserve the estate for the executor or administrator to be regularly appointed.—*In re Williams' Estate*; *Scott v. Davis*, 55 Mont. 63, 173 Pac. 790. The powers of a special administrator are limited to the preservation and protection of the estate temporarily, until a general administrator or an executor has been appointed.—*In re Dolenty's Estate*; *Mannix v. Dolenty*, 53 Mont. 33, 161 Pac. 524. An executrix can not, by the appointment of a special administrator to litigate title, be put into such a position that she may assert title in herself adversely to the estate.—*In re Dolenty's Estate*; *Mannix v. Dolenty*, 53 Mont. 33, 161 Pac. 524.

#### 4. Accounting.

(1) *In general*.—It is the duty of the court to hear and determine the issue raised by the exhibits and accounts of a special administrator, and the objections thereto filed, at least so far as may be necessary for the preservation of the estate before a regular administrator is ap-

pointed.—*French v. Superior Court*, 3 Cal. App. 304, 85 Pac. 133, 134. If the administrator is himself indebted to the decedent, he is properly charged by the probate court, in his account, with the amount of such indebtedness.—*Estate of Armstrong*, 69 Cal. 239, 10 Pac. 335. The rule that a trustee is entitled to repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust, and that he is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate, is not applicable to a special administrator. Hence, although a special administrator makes expenditures in good faith, and for the benefit and preservation of the estate, this does not entitle him to be repaid expenditures not authorized by law. He is therefore not entitled to credit for expenses incurred in employing real estate agents to sell the property of another estate, from the sale of which the estate he represented was benefited by the payment in full of a claim in favor of the deceased against such other estate. Nor is he entitled to repayment of expenses incurred in the employment of an expert to examine and report upon the condition of a mine which he sold; nor is he entitled to expenses paid to a detective agency to watch the office of former executors, who had been removed, on the ground that he believed them to be criminals, where no criminal act was shown; nor is he entitled to credit for costs and expenses incurred in the removal of an executor, in an action brought by him as heir of the deceased and as a creditor of his estate; neither is he entitled to credit for moneys paid to a clerk in his office for engrossing a bill of exceptions; and this, although such expenditures were beneficial to the estate.—*Estate of Bell*, 145 Cal. 646, 648, 649, 650, 79 Pac. 358. In the absence of any statute requiring a special administrator to have appraisers appointed, all expenses incurred by him, or allowances made by him on account of such appraisers, are not justified, and should not be allowed. Neither should the special administrator receive credits for expenses incurred by him in publishing notice to creditors. Neither is the court justified in allowing him the expense of procuring a revenue stamp for his bond.—*In re Ford's Estate*, 29 Mont. 283, 74 Pac. 735. The court must determine whether, under the circumstances, repairs made by a special administrator were necessary, and the expenditures reasonable; and it is competent for the court to make allowances for such repairs as a special administrator may have made in excess of the amount allowed by the court, where it appears that the expenses were necessarily incurred in the proper management of the estate.—*In re Moore*, 88 Cal. 1, 4, 25 Pac. 915. A special administrator, who is individually indebted to the deceased, must charge himself, in his account, with the amount of the debt.—*Estate of Armstrong*, 69 Cal. 239, 241, 10 Pac. 335. A special administrator is charged with the duty of preserving personal property in his hands before it is turned over to the general administrator; but the manner of his doing so is left to his discretion, so long as the expense to the estate is not excessive.—*In re Williams' Estate*; *Scott*

v. Davis, 55 Mont. 63, 173 Pac. 790. If a person, appointed as special administrator, has come from another state for the purpose, he is not to be allowed the expenses of the trip in his account with the estate.—Estate of Emerson, 175 Cal. 724, 167 Pac. 149.

(2) **For money and interest.**—Money coming into the hands of a special administrator, through ancillary administration had in England, belongs prima facie to the estate, and the special administrator is to be charged with it.—In re Williams' Estate; Scott v. Davis, 55 Mont. 63, 173 Pac. 790. A special administrator, inasmuch as he has no power to loan the estate's funds can not be required to pay interest on them because of permitting them to remain idle and unproductive.—In re Williams' Estate; Scott v. Davis, 55 Mont. 63, 173 Pac. 790.

(3) **For taxes.**—Inasmuch as a general administrator may, and a special administrator can not, invest funds, under order of court, so that profits from the investment might cover the amount of taxes on the funds, a special administrator holding funds which he ought to have turned over to the general administrator is himself chargeable with the taxes levied on such funds.—In re Williams' Estate; Scott v. Davis, 55 Mont. 63, 173 Pac. 790.

(4) **For profits.**—The heir succeeds to the intestate's realty immediately on his death, subject only to the court's control for administration purposes; hence, the special administrator must, if profits from this property come into his hands, include these in his final account as part of the estate belonging to the heir.—In re Williams' Estate; Scott v. Davis, 55 Mont. 63, 173 Pac. 790. The only theory on which a special administrator can be held for profits, accruing upon estate funds coming into his hands officially, is that he has made an unlawful use of them; this would not include the deposit of such funds in a bank from which he draws large dividends as a stockholder.—In re Williams' Estate; Scott v. Davis, 55 Mont. 63, 173 Pac. 790.

5. **Reimbursement. Compensation.**—If it becomes necessary, during the management of an estate by a special administrator, to make any repairs, his expenditures must be sanctioned by the court appointing him, either by previous order or by subsequent approval, before he can reimburse himself from the funds of the estate. A prudent person would obtain from the court an order therefor before making such repairs, but it is not an indispensable prerequisite that he should do so. If he is willing to forego such protection, and rely upon his belief that the court will ratify his acts, there is no rule of law which deprives the court of the power to reimburse him, if his acts and expenditures are approved.—In re Moore, 88 Cal. 1, 3, 25 Pac. 915. Although the statute makes no provision for the compensation of a special administrator for his services, the law does not contemplate that such services shall be rendered gratuitously, and the court has a discretionary power to allow him compensation in the settlement of his account.—In re Ford's Estate, 29 Mont. 283, 74 Pac. 735, 736; and it is not im-

proper for the court to make the rate of compensation fixed by the statute for an administrator the standard for determining a proper allowance to be made to him.—*In re Moore*, 88 Cal. 1, 4, 25 Pac. 915. If an order appointing a special administrator was inadvertently granted, without notice as prescribed by the rules of court, the court, or a judge thereof, has power to set the order aside, and its decision is conclusive, in a collateral proceeding, although it was made in the erroneous exercise of jurisdiction. Prohibition will not lie to prevent an erroneous order setting aside and revoking the appointment.—*Raine v. Lawlor*, 1 Cal. App. 483, 486, 82 Pac. 688. An heir or legatee, who seeks the removal of an executor, has no power to deal with, and has no control over, the assets of the estate, and can not make contracts which in any way will bind the estate. Nor can the fact that such heir or legatee afterwards becomes special administrator justify the payment out of the assets of the estate of a sum paid to an attorney's clerk for engrossing his bill of exceptions. It was the duty of the attorney to engross, or cause to be engrossed, the bill of exceptions, and it was a part of the strict legal duty of the attorney. A special remuneration to his clerk is no more a legal charge against the estate for such services than would be a claim for his salary during the time that he was actually employed upon the work.—*Estate of Bell*, 145 Cal. 646, 79 Pac. 358, 359. Where there has been a special administration of an estate, the special administrator is entitled to a compensation for which a reasonable sum must be fixed by the court under section 1417 of the Code of Civil Procedure of California, which section has no relation to the compensation fixed by sections 1618 and 1619 of the same code for a general administrator and his attorney.—*Estate of Miller*, 15 Cal. App. 557, 115 Pac. 329. A special administrator who has gone to a distant state, to withdraw from a bank money of the estate there on deposit, must, if he would charge the estate with his traveling expenses, show that it was necessary for him to go.—*Estate of Emerson*, 175 Cal. 724, 167 Pac. 149.

#### 6. Actions by and against.

(1) *In general*.—If a special administrator brings an action to quiet title, and it does not appear from the face of the claim that he has legal capacity to sue, such omission can be taken advantage of only by answer. It is not a good ground for demurrer.—*Miller v. Luco*, 80 Cal. 257, 259, 22 Pac. 195. An action may be maintained against a special administrator for the obstruction of a private way created or maintained by him, notwithstanding it was placed there by the decedent of whose estate he is special administrator. Such obstruction is a nuisance, and it is no defense that the defendant has no interest in the land over which the way is claimed.—*Hardin v. Sin Claire*, 115 Cal. 460, 47 Pac. 363, 364. Special administrators are included in section 1582 of the Code of Civil Procedure of California, authorizing actions against administrators to quiet title.—*McNeil v. Morgan*, 157 Cal. 373, 108 Pac. 69.

(2) **Costs and expenses.**—Costs in probate proceedings are governed by that section of the Revised Codes which provides that the costs may be taxed against any party to the proceedings, or ordered to be paid from the funds of the estate as justice may require.—*In re Williams' Estate*; *Scott v. Davis*, 55 Mont. 63, 173 Pac. 790. Where costs were incurred by a special administrator, acting both as special administrator and in his private capacity as residuary legatee under a spurious will, he is not entitled to any credit therefor as special administrator so long as it is impossible to separate the costs personal to him from those incurred on behalf of the estate, though benefit may have accrued to the estate by reason of the litigation in which such costs were incurred.—*In re Williams' Estate*; *Scott v. Davis*, 55 Mont. 63, 173 Pac. 790. Where a special administrator is appointed in the county in which the decedent died, and the public administrator in another county is appointed in violation of statute, so that the special administrator is put to the necessity of defending a suit for his removal, the estate should be charged with his expenses.—*In re Williams' Estate*; *Scott v. Davis*, 55 Mont. 63, 173 Pac. 790.

#### 7. Appeal.

(1) **Whether appeal lies.**—No appeal lies from an order appointing a special administrator.—*Estate of Carpenter*, 73 Cal. 202, 14 Pac. 677. If the contestant of the issuance of special letters of administration is defeated, his remedy is by appeal, and not by a writ of prohibition.—*State v. Ayer*, 17 Wash. 127, 49 Pac. 226, 227. There is no statutory right in any person to be appointed special administrator, and, even if no appeal lies from an order revoking the appointment of a special administrator, he can not be greatly injured, because he may again apply upon notice, and be heard the same as any one else, if the court shall deem it necessary to appoint a special administrator.—*Raine v. Lawlor*, 1 Cal. App. 483, 487, 82 Pac. 688. A special administrator, who has been ordered by a court without jurisdiction to pay out money of the estate, is "a party beneficially interested," within the meaning of a statute which authorizes such a party to obtain a writ of review.—*State v. Second Jud. Dist. Ct.*, 18 Mont. 481, 46 Pac. 259, 261. No appeal lies from an order appointing a special administrator, and such an order if made by a court without jurisdiction is subject to be reviewed on certiorari.—*Estate of Paulsen*, 35 Cal. App. 654, 170 Pac. 855. An order made by a circuit judge, in Hawaii, appointing a special administrator, is interlocutory and not appealable.—*Estate of Luttet*, 22 Haw. 712, 714.

(2) **Presumption.**—Where the record on appeal from an order allowing the final account of a special administrator fails to disclose whether certain sales of personal property were made pursuant to the order of court, and the transcript does not purport to contain copies of all the papers in the case, it must be presumed, in the absence of a showing to the contrary, that such sales were made according to law, and

that they were properly approved by the court.—*In re Ford's Estate*, 29 Mont. 283, 74 Pac. 735, 736.

(3) *Stay of proceedings.*—An appeal from an order granting general letters of administration does not stay a distinct proceeding as to special administration of the estate, or control the power of the court under such special administration to make any order it deems necessary or proper. Such orders have no relation or connection with the proceedings in which the order appealed from is made. They are made in a separate, distinct proceeding, and are independent orders. The evident purpose of the law is, that such appeal shall have no effect whatever upon the proceedings in the special administration.—*Estate of Heaton*, 142 Cal. 116, 118, 75 Pac. 662; *Estate of Crozier*, 65 Cal. 332, 4 Pac. 109.

(4) *Considerations for appellate court.*—If the order appointing a special administrator and directing him to take charge of the estate depends for its validity entirely upon the validity of an order previously made annulling an order admitting a will to probate, and this latter order, annulling the order admitting the will to probate, is itself an order void upon its face, unless in turn the order originally admitting the will to probate was itself void on its face, it must follow that if the order annulling the order admitting the will to probate is itself void, then the order appointing the special administrator, which is based on such a void order, is itself necessarily void. Hence, if the order annulling the order admitting the will to probate is void, the subsequent order appointing a special administrator and directing him to take from the petitioner the property distributed to him by the decree, being an attempted interference with his right under such decree, the consideration of the validity or invalidity of the order annulling the order admitting the will to probate, on which the decree is based, is not only proper, but also essentially necessary; and it devolves on the appellate court to determine whether or not the order annulling the order admitting the will to probate was or was not void.—*Dunsmuir v. Coffey*, 148 Cal. 137, 139, 140, 82 Pac. 682, 683. Where the record shows that the various items of expenses were incurred in behalf of the estate, and that the special administrator had vouchers for the same, the appellate court is precluded from considering any of the items, unless, upon the face of the account, they appear to be such as should not have been allowed at all.—*In re Ford's Estate*, 29 Mont. 283, 74 Pac. 735, 736.

(5) *Affirming disallowance of claim paid.*—If the entry of the appointment of a special administrator has not been made upon the minutes of the court, and is not before the appellate court, so that it may determine what powers are conferred upon the special administrator, the disallowance of a claim paid by the special administrator will be affirmed.—*Estate of Sackett*, 78 Cal. 300, 20 Pac. 863.



## CHAPTER VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED,  
AND MISCELLANEOUS PROVISIONS.

- § 327. Letters must be revoked when.
- § 328. Power of executor in such a case.
- § 329. Remaining administrator or executor to continue when his colleagues are disqualified.
- § 330. Who to act when all acting are incompetent.
- § 331. Executor or administrator may resign when. Court to appoint successor. Liability of outgoer.
- § 332. Form. Notice of intention to resign.
- § 333. Form. Resignation of representative.
- § 334. All acts of executor, etc., valid until his power is revoked.
- § 335. Transcript of court minutes to be evidence.

## § 327. Letters must be revoked when.

Upon the admission to probate of a will after a grant of letters of administration on the ground of intestacy, or upon the admission to probate of a later will than the one before admitted to probate, the pre-existing grant of letters testamentary or of administration must be revoked, and the administrator or executor whose grant of authority is thus terminated must render an account of his administration within such time as the court may direct.—*Kerr's Cyc. Code Civ. Proc.*, § 1423.

## ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska—Compiled Laws of 1913, section 1614.
- Arizona—Revised Statutes of 1913, paragraph 834.
- Colorado—Mills's Statutes of 1912, section 7906.
- Hawaii—Revised Laws of 1915, section 2500.
- Idaho—Compiled Statutes of 1919, section 7533.
- Kansas—General Statutes of 1915, section 4509.
- Montana—Revised Codes of 1907, section 7477.
- Nevada—Revised Laws of 1912, section 5935.
- New Mexico—Statutes of 1915, sections 2241, 2244.
- North Dakota—Compiled Laws of 1913, sections 8655, 8697.
- Oklahoma—Revised Laws of 1910, section 6289.

Oregon—Lord's Oregon Laws, section 1158.

South Dakota—Compiled Laws of 1913, section 5751.

Utah—Compiled Laws of 1907, section 3837.

Washington—Laws of 1917, chapter 156, page 655, section 51.

Wyoming—Compiled Statutes of 1910, section 5474.

**§ 328. Power of executor in such a case.**

In such case, the executor or the administrator with the will annexed is entitled to demand, sue for, recover, and collect all the rights, goods, chattels, debts, and effects of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.—*Kerr's Cyc. Code Civ. Proc.*, § 1424.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 835.

Colorado—Mills's Statutes of 1912, section 7921.

Idaho\*—Compiled Statutes of 1919, section 7534.

Montana\*—Revised Codes of 1907, section 7478.

Nevada\*—Revised Laws of 1912, section 5936.

North Dakota—Compiled Laws of 1913, section 8801.

Oklahoma\*—Revised Laws of 1910, section 6290.

South Dakota\*—Compiled Laws of 1913, section 5752.

Washington—Laws of 1917, chapter 156, page 662, sections 78, 79.

Wyoming\*—Compiled Statutes of 1910, section 5475.

**§ 329. Remaining administrator or executor to continue when his colleagues are disqualified.**

In case any one of several executors or administrators, to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust; or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.—*Kerr's Cyc. Code Civ. Proc.*, § 1425.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1619.

Arizona\*—Revised Statutes of 1913, paragraph 836.

Colorado—Mills's Statutes of 1912, sections 7919, 7920, 7986.  
 Idaho\*—Compiled Statutes of 1919, section 7535.  
 Montana\*—Revised Codes of 1907, section 2479.  
 Nevada\*—Revised Laws of 1912, section 5933.  
 New Mexico—Statutes of 1915, section 2219.  
 North Dakota—Compiled Laws of 1913, sections 8653, 8706.  
 Oklahoma\*—Revised Laws of 1910, section 6291.  
 Oregon—Lord's Oregon Laws, section 1163.  
 South Dakota\*—Compiled Laws of 1913, section 5753.  
 Utah—Compiled Laws of 1907, section 3839.  
 Washington—Laws of 1917, chapter 156, page 661, section 76.  
 Wyoming\*—Compiled Statutes of 1910, section 5476.

**§ 330. Who to act when all acting are incompetent.**

If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as heretofore required of administrators, and shall have the like power and authority.—*Kerr's Cyc. Code Civ. Proc.*, § 1426.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1619.  
 Arizona\*—Revised Statutes of 1913, paragraph 837.  
 Colorado—Mills's Statutes of 1912, sections 7919, 7920, 7986.  
 Idaho\*—Compiled Statutes of 1919, section 7536.  
 Kansas—General Statutes of 1915, sections 4508, 4593.  
 Montana\*—Revised Codes of 1907, section 7480.  
 Nevada—Revised Laws of 1912, section 5934.  
 New Mexico—Statutes of 1915, section 2219.  
 Oklahoma\*—Revised Laws of 1910, section 6292.  
 Oregon—Lord's Oregon Laws, section 1163.  
 South Dakota\*—Compiled Laws of 1913, section 5754.  
 Utah—Compiled Laws of 1907, section 3839.  
 Washington—Laws of 1917, chapter 156, page 661, section 77.  
 Wyoming\*—Compiled Statutes of 1910, section 5477.

**§ 331. Executor or administrator may resign when. Court to appoint successor. Liability of outgoer.**

Any executor or administrator may, at any time, by writing, filed in the superior court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivery up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation.—*Kerr's Cyc. Code Civ. Proc.*, § 1427.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1632.
- Arizona\*—Revised Statutes of 1913, paragraph 838.
- Colorado—Mills's Statutes of 1912, section 7920.
- Idaho\*—Compiled Statutes of 1919, section 7537.
- Kansas—General Statutes of 1915, sections 4505, 4506, 4593.
- Montana\*—Revised Codes of 1907, section 7481.
- Nevada—Revised Laws of 1912, section 5937.
- New Mexico—Statutes of 1915, section 2245.
- Oklahoma\*—Revised Laws of 1910, section 6293.
- Oregon—Lord's Oregon Laws, section 1176.
- South Dakota\*—Compiled Laws of 1913, section 5755.
- Utah—Compiled Laws of 1907, section 3838.
- Washington—Laws of 1917, chapter 156, page 662, section 78.
- Wyoming—Compiled Statutes of 1910, section 5478.

**§ 332. Form. Notice of intention to resign.<sup>1</sup>**

[Title of court.]

[Title of estate.]

{ No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

The undersigned, —, executor <sup>3</sup> of the estate of —, deceased, hereby gives notice of his intention to resign his trust; that on the opening of the court on the — day of —, 19—, at the court-house of said county, at —, or as soon thereafter as he can be heard, he will apply to the court to resign his letters; and that he has published, for the period of —, <sup>4</sup> in the —, <sup>5</sup> a newspaper of general circulation in the county wherein his letters were granted, a notice of his intention to apply to the — <sup>6</sup> court for leave so to resign.

—, Executor <sup>7</sup> of the Estate of —, Deceased.

**Explanatory notes.**—<sup>1</sup> Form appropriate for Washington and Oregon.  
<sup>2</sup> Give file number. <sup>3</sup> Or, administrator. <sup>4</sup> Number of weeks, as prescribed by the statute. <sup>5</sup> Name of paper. <sup>6</sup> Designating it. <sup>7</sup> Or, administrator.

**§ 333. Form. Resignation of representative.<sup>1</sup>**

[Title of court.]

[Title of estate.]

{ No. —. <sup>2</sup> Dept. No. —.  
[Title of form.]

To the Honorable — Court of the County of —, State of —.

I hereby respectfully tender my resignation as executor <sup>3</sup> of the estate of —, deceased.

Dated —, 19—.

—, Executor <sup>4</sup> of the Estate of —, Deceased.

**Explanatory notes.**—<sup>1</sup> Form appropriate for Washington or Oregon.  
<sup>2</sup> Give file number. <sup>3</sup>, <sup>4</sup> Or, administrator.

**§ 334. All acts of executor, etc., valid until his power is revoked.**

All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully

to execute the duties of his trust.—*Kerr's Cyc. Code Civ. Proc.*, § 1428.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 839.  
 Idaho\*—Compiled Statutes of 1919, section 7538.  
 Kansas—General Statutes of 1915, section 4511.  
 Montana\*—Revised Codes of 1907, section 7482.  
 Nevada—Revised Laws of 1912, section 5938.  
 North Dakota—Compiled Laws of 1913, section 8705.  
 Oklahoma\*—Revised Laws of 1910, section 6294.  
 South Dakota\*—Compiled Laws of 1913, section 5756.  
 Wyoming\*—Compiled Statutes of 1910, section 5479.

#### § 335. Transcript of court minutes to be evidence.

A transcript from the minutes of the court, showing the appointment of any person as executor or administrator, together with the certificate of the clerk, under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked, shall have the same effect in evidence as the letters themselves.—*Kerr's Cyc. Code Civ. Proc.*, § 1429.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 840.  
 Idaho\*—Compiled Statutes of 1919, section 7539.  
 Montana\*—Revised Codes of 1907, section 7483.  
 Nevada—Revised Laws of 1912, section 5939.  
 Oklahoma—Revised Laws of 1910, section 6295.  
 South Dakota\*—Compiled Laws of 1913, section 5757.  
 Wyoming\*—Compiled Statutes of 1910, section 5480.

#### INCAPACITY OF REPRESENTATIVE TO ACT.

1. In general.
2. Administrator with will annexed.

1. In general.—The power or jurisdiction of the probate court to appoint a new administrator may be exercised upon the happening of the death, insanity, or conviction of an infamous offense, of the former administrator, or upon the revocation of his power and authority by the court. In case of the death, insanity, or conviction of the former administrator, such death, insanity, or conviction must be judicially

ascertained by the probate court before a new appointment can be made, but such fact may be properly ascertained by the court in a proceeding under a petition for the appointment of a new administrator. In case of the death of the former administrator, the fact is properly presented to the court in a petition for the appointment of a new administrator, and upon the hearing the fact may be established by witnesses. In case of the conviction of the former administrator of an infamous offense, the fact may be presented in the same manner, and proved upon the hearing by the production of the record of his conviction. No citation to the convict is necessary, as it is the fact of the conviction, when shown to the court by the proper allegation and evidence, which authorizes the court to make the new appointment. The convict is not a necessary party to the proceeding. He has had his day in court, and is conclusively bound by the record.—*Estate of Blinn*, 99 Cal. 216, 220, 33 Pac. 841. The fact that the representative of the estate of a deceased person was sent to an insane asylum by an order of court does not create an absolute vacancy in the administration of the estate, although, for the time being, he is incapable of executing the trust.—*Estate of Moore*, 68 Cal. 281, 283, 9 Pac. 164. The legislature of California has classified death, insanity, and conviction of an infamous offense under the designation "incapable," and other matters affecting the integrity or qualification for the discharge of the duties of an administrator as "incompetency." The embezzler, the thief, the man who hesitates at no fraudulent scheme to despoil an estate, or who is so careless and indifferent as to neglect, habitually and grossly, his duties, may have capacity to discharge properly all the duties of an administrator, but the man who is dead, or insane, or civiliter mortuus is "incapable." Whether the word "incompetent" was wisely chosen or not, the context of the statute leaves no room to doubt the sense in which it was used, and that it was used to designate a different class from those characterized as "incapable."—*Estate of Blinn*, 99 Cal. 216, 221, 33 Pac. 841.

2. Administrator with will annexed.—If an executor resigns his trust without having closed the administration of the estate, it is the duty of the court to appoint an administrator with the will annexed to complete the administration.—*Estate of Pina*, 112 Cal. 14, 16, 44 Pac. 332; *Estate of Strong*, 119 Cal. 663, 667, 51 Pac. 1078. The appointment of such an administrator supersedes, per se, all former administrations of the estate.—*McCauley v. Harvey*, 49 Cal. 497, 505. Such an administrator, under the statute of California, possesses all the power conferred upon the executor named in the will.—*Kidwell v. Brummagin*, 82 Cal. 436, 441; *Crouse v. Peterson*, 130 Cal. 169, 80 Am. St. Rep. 89, 62 Pac. 475, 615; and see *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1356.

#### REFERENCES.

Effect of insanity or mental incompetency of executor or administrator.—See note 45 L. R. A. (N. S.) 1073.

## CHAPTER IX.

DISQUALIFICATION OF JUDGES, AND TRANSFERS OF  
ADMINISTRATION.

- § 336. When judge not to act.
- § 337. Transfers of probate matters to adjoining county.
- § 338. Form. Order transferring proceedings.
- § 339. Transfer not to change right to administer. Retransfer, how made.
- § 340. Form. Petition for order transferring proceeding.
- § 341. Form. Order retransferring proceeding.
- § 342. When proceedings must be returned to original court.

## § 336. When judge not to act.

No will shall be admitted to probate, or letters testamentary or of administration granted, before any judge who is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting.—*Kerr's Cyc. Code Civ. Proc.*, § 1430.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Arizona\*—Revised Statutes of 1913, paragraph 841.
- Colorado—Mills's Statutes of 1912, sections 7890, 7900.
- Idaho\*—Compiled Statutes of 1919, section 7540.
- Montana—Revised Codes of 1907, section 7484.
- Nevada—Revised Laws of 1912, sections 5940, 5941.
- North Dakota\*—Compiled Laws of 1913, section 8535.
- South Dakota—Compiled Laws of 1913, section 5653.
- Utah—Compiled Laws of 1907, section 3776.
- Wyoming—Compiled Statutes of 1910, section 5481.

## § 337. Transfer of probate matters to adjoining county.

When a petition is filed in the superior court, praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the superior court for the settlement of



an estate, and there is no judge of said court qualified to act, an order must be made transferring the proceedings to the superior court of an adjoining county, and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceedings are ordered to be transferred a certified copy of the order and all papers on file in his office in the proceedings.

**AUTHORITY OF COURT TO WHICH TRANSFERRED.**—And thereafter the court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate.

**WHEN CASE SHALL NOT BE TRANSFERRED.**—Provided, there shall not be any necessity for transferring such proceedings, or any of them, when a judge of some other county qualified to act attends at the request of the judge of the county where such proceedings are pending, to hold court, to conduct and to try such proceedings; and such judge when so called upon to preside, shall exercise the same jurisdiction over any proceeding in the estate as is exercised in other cases under like circumstances.—*Kerr's Cyc. Code Civ. Proc.*, § 1431.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

**Arizona\***—Revised Statutes of 1913, paragraph 842.

**Colorado**—Mills's Statutes of 1912, sections 7890, 7900.

**Idaho**—Compiled Statutes of 1919, section 7541.

**Kansas**—General Statutes of 1915, section 4689.

**Montana**—Revised Codes of 1907, section 7485.

**North Dakota\***—Compiled Laws of 1913, section 8536.

**Oklahoma**—Laws of 1913, chapter 208, page 460 (transfers of guardianships and other proceedings legalized).

**South Dakota**—Compiled Laws of 1913, section 5654.

**Utah**—Compiled Laws of 1907, section 3776.

**Wyoming**—Compiled Statutes of 1910, section 5481.

**§ 338. Form. Order transferring proceedings.**

[Title of court.]

[Title of proceeding.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

It appearing that —; <sup>2</sup> and that there is no judge of this court qualified to act therein,—

It is ordered, That the above-entitled proceeding be, and the same is hereby, transferred to the — court of the county <sup>3</sup> of —, being an adjoining county; and the clerk of this court is hereby directed to transmit to the clerk of the — court of said county <sup>4</sup> of — a certified copy of this order, and all papers on file in his office in said proceedings.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> A petition has been filed herein for the admission to probate of the will of —, deceased; or, for the granting of letters testamentary thereon; or, that a petition has been filed for letters of administration on the estate of —, deceased; or, that proceedings are now pending in this court for settlement of the estate of —, deceased. <sup>3, 4</sup> Or, city and county.

**§ 339. Transfer not to change right to administer. Retransfer, how made.**

The transfer of a proceeding from one court to another as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order hereinbefore provided. If, before the administration is closed of any estate so transferred as herein provided, another person is elected or appointed, and qualified as judge of the court wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting

forth these facts, and moving the court therefor.—*Kerr's Cyc. Code Civ. Proc.*, § 1432.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 843.

Idaho\*—Compiled Statutes of 1919, section 7542.

Montana\*—Revised Codes of 1907, section 7486.

North Dakota\*—Compiled Laws of 1913, section 8537.

South Dakota—Compiled Laws of 1913, section 5654.

#### § 340. Form. Petition for order retransferring proceeding.

[Title of court.]

[Title of proceeding.]

{ No. —, 1 Dept. No. —.  
[Title of form.]

To the Honorable the — Court of the County<sup>2</sup> of —.

The petition of — respectfully shows:

That he is interested in the above estate, and is —;<sup>3</sup>

That the proceedings in said estate were originally commenced in the — court of the county<sup>4</sup> of —, that being the court having original jurisdiction thereof;

That said proceedings were transferred to this court, by order, about the — day of —, 19—, on account of the disqualification of the then judge of said former court, and are still pending in this court;

That since said transfer, and on or about the — day of —, 19—, the Honorable — was elected<sup>5</sup> judge of the court from which said proceedings were transferred, and has duly qualified, is now judge of said court, and is in no wise disqualified to act in said proceedings; and that the causes for which the said proceedings were transferred to this court no longer exist;

That the convenience of those interested in said estate, and of most of those who will have occasion to consult the records of said proceedings, and of all witnesses who will probably be called to testify in regard to any matter in the course of said proceedings, or concerning the administration of said estate, will be much promoted by the

retransfer of said proceeding to the — court of said county <sup>6</sup> of —, from which it was transferred to this court, as above shown;—

Wherefore your petitioner prays that an order be made retransferring said proceedings to the — court of the county <sup>7</sup> of —.

Dated —, 19—.

—, Petitioner.

—, Attorney for Petitioner.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, City and County.  
<sup>3</sup> Give nature of interest; as, heir, devisee, executor, administrator, etc.  
<sup>4</sup> Or, city and county. <sup>5</sup> Or, appointed. <sup>6, 7</sup> Or, city and county.

#### § 341. Form. Order retransferring proceeding.

[Title of court.]

[Title of proceeding.]

{ No. —. <sup>1</sup> Dept. No. —.  
 [Title of form.]

It appearing from the petition of —, <sup>2</sup> herein filed, that the causes for which the above-entitled proceeding was transferred to this court no longer exist, and that good cause exists therefor,—

It is ordered, That the above-entitled proceeding be, and the same is hereby, transferred back to the — court of the county <sup>3</sup> of —, from which it was transferred to this court; and the clerk of this court is directed to transmit to the clerk of said — court of the county <sup>4</sup> of — a certified copy of this order, and all original papers on file in his office relating to said proceeding.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Give name of petitioner.  
<sup>3, 4</sup> Or, city and county.

#### § 342. When proceedings must be returned to original court.

On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the court where it was orig-

inally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced, a certified copy of the order, and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate.—*Kerr's Cyc. Code Civ. Proc.*, § 1433.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 844.

Idaho\*—Compiled Statutes of 1919, section 7543.

Montana\*—Revised Codes of 1907, section 7487.

North Dakota\*—Compiled Laws of 1913, section 8538.

South Dakota—Compiled Laws of 1913, section 5654.

Utah—Compiled Laws of 1907, section 3776.

#### DISQUALIFICATION OF JUDGE. TRANSFER OF PROCEEDINGS.

Judge is disqualified when.—Where the sons of the judge are attorneys and hold a contract for a share of the estate, and are therefore the equitable owners of such share, such judge is disqualified from hearing and adjudging a contest upon a petition for the revocation of letters of administration, and for the issuance of letters to another, who claims the entire estate as sole heir.—*Howell v. Budd*, 91 Cal. 342, 350, 27 Pac. 747. In this case the application for a transfer of the cause was clearly insufficient, but, as an adjudication of the cause upon its merits was desired, and objection to the course adopted by the petitioner in making his application for an order of transfer was waived, the court proceeded to examine the cause upon the main questions involved.—*Howell v. Budd*, 91 Cal. 342, 347, 27 Pac. 747. Where the appointment of an administrator is not in favor of a creditor, and involves no interest or bias of the judge as a creditor, but is of a nominee of the widow under subdivision 1 of section 1365 of the Code of Civil Procedure of California, as to which the judge has no discretion to do otherwise than to make the appointment, the interest of the judge as a creditor, in such a case, should not disqualify him from making the appointment, nor render his general proceedings under such administration void.—*Regents, etc., v. Turner*, 159 Cal. 541, Ann. Cas. 1912C, 1162, 114 Pac. 842. A judge is disqualified to sit in guardianship proceedings where the guardian is his brother-in-law, the guardian being "a party" within the meaning of section 2012 of the Oklahoma Compiled Laws of 1909, which provides that "No judge of any court of record shall sit in any cause or proceeding in which he

may be related to any party to said cause, within the fourth degree of consanguinity or affinity."—*Hengst v. Burnett*, 40 Okla. 42, 135 Pac. 1062, 1063. Section 10 of article 7, chapter 14, Laws of Oklahoma, of 1909, as amended in 1911, providing for the transfer of causes from the superior to the county and district courts, was not repealed by section 2, chapter 39, of the Laws of 1911, the same being saved from repeal by the act adopting the Revised Laws, the revisors having intentionally omitted to include in the revision any express authority for such transfer of causes.—*In re Nichol's Will* (Okla.), 166 Pac. 1087, 1090.

#### REFERENCES.

Removal to federal court of actions relating to estates of deceased persons, because of separable controversy.—See note 5 L. R. A. (N. S.) 49, 81.

## CHAPTER X.

## REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

- § 343. Suspension of power of executor.
- § 344. Form. Affidavit for removal.
- § 345. Form. Order suspending administrator or executor.
- § 346. Form. Order suspending powers of administrator or executor until question of waste can be determined.
- § 347. Form. Order restoring powers of suspended administrator or executor.
- § 348. Revocation of letters when.
- § 349. Form. Order revoking letters of administration. (Short form.)
- § 350. Form. Order revoking letters for wasting estate.
- § 351. Any party interested may appear on hearing.
- § 352. Form. Allegations of cause for removal.
- § 353. Notice to absconding executors and administrators.
- § 354. Form. Order to show cause, and directing notice to absconding administrator or executor.
- § 355. Court may compel attendance.

## REMOVAL. SUSPENSION. RESIGNATION.

- |                               |   |
|-------------------------------|---|
| 1. In general.                | 7. What is cause for removal.                     |
| 2. Vacancy in administration. | 8. Removal of non-resident executors for absence. |
| 3. Resignation.               | 9. What is no cause for removal.                  |
| 4. Province of court.         | 10. Notice. Hearing. Evidence.                    |
| 5. Petition for removal.      | 11. Order of removal, and its effect.             |
| 6. Suspension.                | 12. Appeal.                                       |

## § 343. Suspension of powers of executor.

Whenever a judge of a superior court has reason to believe from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, direct such executor or

administrator to be cited to appear and show cause why his letters should not be revoked, and may also suspend the powers of such executor or administrator, until the matter is investigated.—*Kerr's Cyc. Code Civ. Proc.*, § 1436.

## ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1615.  
 Arizona—Revised Statutes of 1913, paragraph 845.  
 Colorado—Mills's Statutes of 1912, section 7918.  
 Idaho—Compiled Statutes of 1919, section 7544.  
 Kansas—General Statutes of 1915, sections 4507, 4512.  
 Montana—Revised Codes of 1907, section 7488.  
 Nevada—Revised Laws of 1912, section 6097.  
 North Dakota—Compiled Laws of 1913, sections 8700, 8702.  
 Oklahoma—Revised Laws of 1910, section 6296.  
 Oregon—Lord's Oregon Laws, sections 1159, 1160.  
 South Dakota—Compiled Laws of 1913, section 5758.  
 Utah—Compiled Laws of 1907, section 3837.  
 Washington—Laws of 1917, chapter 156, page 655, sections 52, 74.  
 Wyoming—Compiled Statutes of 1910, section 5482.

## § 344. Form. Affidavit for removal.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
 [Title of form.]

State of —, }  
 County <sup>2</sup> of —, } ss.

—, being duly sworn, says that he is a creditor <sup>3</sup> of said estate, and is interested therein; that his claim has been approved and filed, and that no part thereof has been paid.<sup>4</sup>

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.<sup>5</sup>

Explanatory notes.—1 Give file number. 2 Or, City and County. 3 Or other interested person. 4 Here state the facts which authorize the removal of the administrator or executor; such as those which show that he has wasted, embezzled, or mismanaged, or is about to waste or embezzle, the property of the estate; or, has committed, or is about to commit, a fraud upon the estate; or, is incompetent to act; or, has permanently removed from the state; or, has wrongfully neglected the estate; or, has long neglected to perform any act as such administrator or executor. 5 Or other officer taking the oath.



**§ 345. Form. Order suspending administrator or executor.**

[Title of court.]

[Title of estate.]

{	No. ——.1	Dept. No. —.
	[Title of form.]	

The undersigned, judge of the — court of the county<sup>3</sup> of —, state of —, having reason to believe, from his own knowledge,<sup>4</sup> that — the administrator<sup>5</sup> of the above-entitled estate, is wasting, embezzling, and mismanaging the property of the said estate committed to his charge,<sup>6</sup>—

It is ordered, That the powers of the said —, as such administrator,<sup>7</sup> be, and they are hereby, suspended until the matter is investigated.

It is further ordered, That a citation be issued to the said —, notifying him of such suspension, and requiring him to show cause in the above-entitled court, at the court-room thereof,<sup>8</sup> on —, the — day of —, 19—, why his letters should not be revoked.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2 Title of court. 3 Or, city and county. 4 Or, from credible information. 5 Or, administratrix; or, administrator or administratrix with the will annexed; or, executor or executrix; or the plural of any of these, according to the fact. 6 Or other act justifying suspension. 7 Or, executor, etc., as the case may be. 8 Give number of department, if any, and location of court-room. 9 Day of week.

**§ 346. Form. Order suspending powers of administrator or executor until question of waste can be determined.**

[Title of court.]

[Title of estate.]

{	No. ——.1	Dept. No. —.
	[Title of form.]	

It appearing from the verified petition of —, now on file in the above-entitled matter, that —, the administrator<sup>2</sup> of said estate, is wasting the property thereof, and that petitioner prays that said administrator be required to give further security,<sup>3</sup>—

It is ordered, That the powers of —, as such administrator<sup>4</sup> of the estate of —, deceased, be, and they are

hereby, suspended until the matter can be heard and determined; and that a copy of this order be served upon —, the said administrator.<sup>5</sup>

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2 Or, executor, etc., according to the fact. 3 Or, to give bond, where, by the terms of the will, no bond was originally required. 4, 5 Or, executor, etc., as the case may be.

**§ 347. Form. Order restoring powers of suspended administrator or executor.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

This court having, on the — day of —, 19—, made an order suspending the powers of —, the administrator<sup>2</sup> of said estate, until certain matters named in said order could be investigated, and said matters having been fully investigated, but it appearing that said administrator<sup>3</sup> has not been derelict in his duty toward said estate,—

It is ordered, That his powers as such administrator<sup>4</sup> be, and the same are hereby, restored.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2-4 Or, administratrix; or, administrator or administratrix with the will annexed; or, executor or executrix of the last will and testament of —; or the plural of any of these, according to the fact.

**§ 348. Revocation of letters when.**

If the executor or administrator fails to appear in obedience to the citation, or, if he appears, and the court is satisfied from the evidence, that there exists cause for his removal, his letters must be revoked.—*Kerr's Cyc. Code Civ. Proc.*, § 1437.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

**Alaska**—Compiled Laws of 1913, section 1615.

**Arizona**—Revised Statutes of 1913, paragraph 846.

**Colorado**—Mills's Statutes of 1912, section 7918.

**Idaho**—Compiled Statutes of 1919, section 7545.

**Kansas**—General Statutes of 1915, section 4507.

Montana—Revised Codes of 1907, section 7489.  
 Nevada—Revised Laws of 1912, section 6099.  
 New Mexico—Statutes of 1915, section 2244.  
 North Dakota—Compiled Laws of 1913, section 8700.  
 Oklahoma—Revised Laws of 1910, section 6297.  
 Oregon—Lord's Oregon Laws, sections 1159, 1160.  
 South Dakota—Compiled Laws of 1913, section 5759.  
 Utah—Compiled Laws of 1907, section 3837.  
 Washington—Laws of 1917, chapter 156, page 661, sections 52, 74.  
 Wyoming—Compiled Statutes of 1910, section 5483.

**§ 349. Form. Order revoking letters of administration. (Short form.)**

[Title of court.]

[Title of estate.]

{ No. ——. <sup>1</sup> Dept. No. ——.   
 [Title of form.]

The court being satisfied that cause exists for the removal of —, as administrator <sup>2</sup> of the estate of —, deceased, and for the revocation of his letters of administration,<sup>3</sup>—

It is hereby ordered, That the letters of administration <sup>4</sup> heretofore granted to —, as administrator <sup>5</sup> of the above-entitled estate, be, and the same are hereby, revoked; and the said — is hereby ordered to file an account and report of his administration within — days from the date of this order.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, executor, etc., according to the fact. <sup>3, 4</sup> Or, letters testamentary. <sup>5</sup> Or, executor, etc., as the case may be.

**§ 350. Form. Order revoking letters for wasting estate.**

[Title of court.]

[Title of estate.]

{ No. ——. <sup>1</sup> Dept. No. ——.   
 [Title of form.]

It appearing to the court that a charge of wasting the estate of —, deceased, has been preferred against —, the administrator <sup>2</sup> thereof; and the court, on credible information, having heretofore made an order suspending the powers of such administrator <sup>3</sup> until such charge could be investigated; and it being shown to the court

that a citation was duly issued to the said —, notifying him of such suspension, and commanding him to appear <sup>4</sup> and show cause, at a time and place mentioned; that said citation has been duly served upon said administrator <sup>5</sup> and returned, as provided by law and as directed by this court; and that —, one of the heirs at law of said deceased, has filed his written allegations showing reasons why the letters of said administrator <sup>6</sup> should be revoked; that the said administrator <sup>7</sup> has made answer to said citation and to said written allegations; and said matter having come on regularly for hearing, <sup>8</sup> and the court having proceeded to hear the allegations and proofs of the parties, and having found that said administrator <sup>9</sup> has grossly mismanaged such estate and wasted it;—

It is therefore ordered, That the letters of administration <sup>10</sup> heretofore granted to the said — be, and the same are hereby, revoked.

—, Judge of the — Court.

Dated —, 19—.

**Explanatory notes.**—1 Give file number. 2, 3 Or, executor, etc., according to the fact. 4 Before the court, or a judge thereof. 5 Or, executor, etc., as the case may be. 6 Or, letters testamentary. 7 Or, executor. 8 Or, if the matter has been continued, say, "and the hearing of said matter having been regularly postponed to this day." 9 Or, executor, as the case may be. 10 Or, letters testamentary.

**§ 351. Any party interested may appear on hearing.**

At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court.—*Kerr's Cyc. Code Civ. Proc.*, § 1438.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1615.

Arizona\*—Revised Statutes of 1913, paragraph 847.

Colorado—Mills's Statutes of 1912, section 7918.

Idaho\*—Compiled Statutes of 1919, section 7546.  
 Montana\*—Revised Codes of 1907, section 7490.  
 Nevada—Revised Laws of 1912, section 6100.  
 New Mexico—Statutes of 1915, section 2241.  
 Oklahoma\*—Revised Laws of 1910, section 6298.  
 Oregon—Lord's Oregon Laws, sections 1159, 1160.  
 South Dakota\*—Compiled Laws of 1913, section 5760.  
 Wyoming\*—Compiled Statutes of 1910, section 5484.

§ 352. Form. Allegations of cause for removal.

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
 [Title of form.]

—, who is interested in the above-entitled estate,<sup>2</sup> now comes and files his allegations, in writing, as herein-after stated, showing why —, the administrator<sup>3</sup> of the estate of said deceased, should be removed.

First. That said administrator<sup>4</sup> has wasted and is wasting<sup>5</sup> said estate, in this, —.<sup>6</sup>

Second. That said administrator<sup>7</sup> has embezzled and converted to his own use property of said estate committed to his charge,<sup>8</sup> in this, —.<sup>9</sup>

Third. That said administrator<sup>10</sup> has mismanaged the property of the estate committed to his charge, in this, —.<sup>11</sup>

Fourth. That said administrator<sup>12</sup> has committed<sup>13</sup> a fraud upon said estate, in this, —.<sup>14</sup>

Fifth. That said administrator<sup>15</sup> is incompetent to act, for the reason that —.<sup>16</sup>

Sixth. That said administrator<sup>17</sup> has permanently removed from the state.<sup>18</sup>

Seventh. That said administrator<sup>19</sup> has wrongfully neglected the said estate, in this, —.<sup>20</sup>

Eighth. That said administrator<sup>21</sup> has long neglected to perform any act as such administrator.<sup>22</sup>

Wherefore the said —<sup>23</sup> prays that the letters of said administrator<sup>24</sup> be revoked.

—, Attorney for the said —.<sup>25</sup>

**Explanatory notes.**—1 Give file number. 2 As, creditor, heir at law, etc., according to the fact. 3, 4 Or, executor, etc., as the case may be. 5 Or, is about to waste. 6 State the facts. 7 Or, executor. 8 Or, is about to embezzle, etc., stating how. 9 Giving the facts. 10 Or, executor. 11 State how. 12 Or, executor. 13 Or, is about to commit. 14 Show how. 15 Or, executor. 16 State the reason. 17 Or, executor. 18 Give the facts. 19 Or, executor. 20 Show how. 21, 22 Or, executor. 23 Name of interested party. 24 Or, letters testamentary. 25 Name of interested party.

### § 353. Notice to absconding executors and administrators.

If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication, in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.—*Kerr's Cyc. Code Civ. Proc.*, § 1439.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 848.

Idaho\*—Compiled Statutes of 1919, section 7547.

Montana\*—Revised Codes of 1907, section 7491.

Nevada—Revised Laws of 1912, section 6101.

New Mexico—Statutes of 1915, section 2241.

Oklahoma\*—Revised Laws of 1910, section 6300.

Oregon—Lord's Oregon Laws, section 1160.

South Dakota\*—Compiled Laws of 1913, section 5762.

Washington—Laws of 1917, chapter 156, page 661, section 74.

Wyoming—Compiled Statutes of 1910, section 5485.

### § 354. Form. Order to show cause, and directing notice to absconding administrator or executor.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

It appearing that —, administrator <sup>2</sup> of the estate of —, deceased, has absconded,<sup>3</sup> —

It is ordered, That the clerk of this court cause notice to be given to the said — to appear before this court, at the court-room thereof,<sup>4</sup> on —,<sup>5</sup> the — day of —,

19—, and then and there show cause, if any he can, why his letters should not be revoked.

It is further ordered, That notice of the proceedings aforesaid be given to the said — by publication, and that said notice be published in the —, a newspaper of general circulation printed in said county,<sup>6</sup> once a week, for four weeks.<sup>7</sup> —, Judge of the — Court.

Dated —, 19—.

**Explanatory notes.**—1 Give file number. 2 Or, executor, etc., according to the fact. 3 Or, concealed himself; or, has removed or absented himself from the state. 4 Give department, if any, and location of court-room. 5 Day of week. 6 Or, city and county. 7 Or in any other manner that the court may direct. The court may also order a copy of the publication, and a certified copy of the petition for removal, to be mailed, postage prepaid, and registered, directed to any address where the absconding administrator or executor may be found.

#### § 355. Court may compel attendance.

In the proceedings authorized by the preceding sections of this article, for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions, on oath, touching his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both.—*Kerr's Cyc. Code Civ. Proc.*, § 1440.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 849.

Idaho\*—Compiled Statutes of 1919, section 7548.

Montana\*—Revised Codes of 1907, section 7492.

Nevada—Revised Laws of 1912, section 6102.

North Dakota—Compiled Laws of 1913, section 8701.

Oklahoma\*—Revised Laws of 1910, section 6299.

South Dakota\*—Compiled Laws of 1913, section 5761.

Washington—Laws of 1917, chapter 156, page 706, section 220.

Wyoming\*—Compiled Statutes of 1910, section 5486.

## REMOVAL. SUSPENSION. RESIGNATION.

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|-------------------------------|---|
| 1. In general.                | 8. Removal of non-resident executors for absence. |
| 2. Vacancy in administration. | 9. What is no cause for removal.                  |
| 3. Resignation.               | 10. Notice. Hearing. Evidence.                    |
| 4. Province of court.         | 11. Order of removal, and its effect.             |
| 5. Petition for removal.      | 12. Appeal.                                       |
| 6. Suspension.                |   |
| 7. What is cause for removal. |   |

1. In general.—A statute which provides that a sworn petition may be presented, setting forth waste by the executor, and praying that he be required to give bond, and that, when such petition is filed, the powers of the executor may be suspended until the matter can be heard and determined, does not in any way conflict with a statute which gives to the probate court a general power to require a bond in proper cases.—*Estate of White*, 53 Cal. 19. An ex parte order appointing a special administratrix does not operate as a removal of an executrix previously appointed.—*Schroeder v. Superior Court*, 70 Cal. 343, 344, 11 Pac. 651. Under a statute which provides that any creditor of the estate, or any "person interested" therein, may apply for the removal of an administrator, an attorney who has performed services for the estate has an interest therein sufficient to authorize him to petition for the removal of the administrator; and the court, in passing on the matter, will take judicial notice of its records and prior proceedings in the administration of the estate.—*In re Miller's Estate*, 40 Or. 424, sub nom.; *Knight v. Hamakar*, 67 Pac. 107, 109. Under some circumstances, an administratrix is entitled to enjoin the prosecution of a proceeding for her removal. Thus where the administratrix and a county, at the time the proceedings for her removal were instituted in the county court, were engaged in litigation over a claim for a large amount of money, asserted by the county against the estate of which she was administratrix, and the county had brought sundry actions, suits, and proceedings to establish its claim, and the administratrix was making an honest and apparently successful defense thereto, and the county had been unable to establish its claim, but, to prevent the administratrix from making such defense, and to enable it to succeed in the litigation, it instituted a proceeding for her removal, in the court presided over by the person who had been most active in her behalf, and under whose direction the litigation was being conducted, and where, to give it an apparent standing to maintain such proceeding, the county alleged that it was a creditor of the estate, although it had not established the claim to that relationship, and was not entitled to the rights of a creditor, it seems manifest that the proceeding could not have been instituted in good faith, but was instituted for the purpose of vexing, annoying, and harassing the administratrix, and illegally and wrongfully to deprive the estate, represented by her, of the right to defend against the actions and suits brought by the county on an alleged wrongful claim. Under these circumstances, a court of equity should not hesitate to interfere, by



injunction, to protect the rights of the administratrix.—*Alderman v. Tillamook County*, 50 Or. 48, 91 Pac. 298, 299. The law affords ample remedies to all persons interested in the estate against the acts of any administrator who may be found not to have the best interests of the estate at heart. The bond, exacted of the administrator, is one means of protection and another is the removal to which the administrator is subject on proof of his wrongful acts or omissions.—*Estate of McCausland*, 170 Cal. 134, 137, 148 Pac. 924. If an executrix, by presenting a claim against the estate, or otherwise, puts herself into such a position that she can not assert title in herself adversely to the estate, the only remedy for the situation is to remove the executrix and substitute a successor for her who may bring such action as may be necessary to determine the title; but if she is the sole beneficiary under the will, this would be wholly unnecessary unless it should appear that the estate has become insolvent.—*In re Dolenty's Estate*, *Mannix v. Dolenty*, 53 Mont. 33, 161 Pac. 524.

#### REFERENCES.

Grounds for the removal of an executor or administrator.—See note 138 Am. St. Rep. 525.

2. Vacancy in administration.—There must be a vacancy in the administration before the appointment of a new administrator.—*Haynes v. Meeks*, 20 Cal. 288, 311. There is no such thing as the removal of an existing administrator, simply by force of the appointment of another. The office must first become vacant before a second appointment can be made. A vacancy may arise by operation of law upon the happening of certain events, as by lunacy of the administrator, established by judicial decree, or by his conviction of an infamous crime.—*Haynes v. Meeks*, 20 Cal. 288, 311. But the sending of an administrator to an asylum for the insane does not create an entire vacancy in the administration of the estate, as that provision of the code which provides that an office becomes vacant on the happening of the incumbent's insanity, "found upon a commission of lunacy issued to determine the fact," has reference to a commission issued out of chancery, and is not the ordinary proceeding taken to send one to an insane asylum.—*Estate of Moore*, 68 Cal. 281, 283, 9 Pac. 164. If one of several executors or administrators should die, become a lunatic, be convicted of an infamous crime, or otherwise become incapable of executing the trust, the remaining executors or administrators must proceed to complete the execution of the will or administration; and if all the executors or administrators die or become incapable, the court must issue letters to others.—*Estate of Moore*, 68 Cal. 281, 283, 9 Pac. 164. Nor does the fact that a public administrator failed to file an additional bond on taking out letters, as directed by the probate judge, create a vacancy in the office, ipso facto, though it is a ground for declaring a vacancy therein upon a judicial

ascertainment and declaration of such omission.—*In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495, 496.

3. *Resignation*.—A resignation is not a matter absolutely in the power of an administrator, to be made at any time he may choose. The statute confers upon him only a conditional right to resign; that is, "provided he shall first settle his accounts and deliver up all the estate to such person as may be appointed by the court"; but the inference to be drawn from such a statute is, that the permission given in the one case is a negative upon the right in all others.—*Haynes v. Meeks*, 20 Cal. 288, 310; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703. After his appointment, an administrator has no right to resign, except in the manner pointed out in the statute. He can not put aside the trust at his own volition. He has no right to consider his own convenience, merely, in such a case. He must first comply with the requirements of the statute before he has the right to ask leave of the court to resign, and it is not till then that the court can allow it.—*Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456, 459. If the executor or administrator of an estate resigns his trust, and a new executor is appointed, it must be presumed, on appeal, in favor of the action of the court below, that the former executor or administrator had settled his accounts, delivered up all the assets of the estate to his successor, and that all conditions existed which were necessary to authorize the new appointment.—*Lucas v. Todd*, 28 Cal. 182, 185; *Jennings v. Le Breton*, 80 Cal. 8, 18, 21 Pac. 1127; *Estate of Allen*, 78 Cal. 581, 21 Pac. 426. Upon the resignation of the administrator, it is the duty of the court to appoint another, competent to receive the estate from the retiring administrator, and complete its administration.—*Wilson v. Hernandez*, 5 Cal. 437, 443. If a person tenders his resignation as administrator and files, at the same time his account with the estate, showing his receipts and disbursements, but shortly afterwards certain heirs of the deceased petition for the appointment of an administrator de bonis non, and, at the same time, file objections to the accounts submitted by the administrator, who, on the hearing of such matters, withdraws his resignation, whereupon the petitioners ask for his removal, on the ground that he had wrongfully neglected his duties as administrator, to the detriment of the estate, the heirs have the right to insist upon the revocation of his letters. The administrator, having filed his resignation, and thereby tendered the issue whether or not his letters should be revoked, could not, after the issue had been joined in by the heirs of the estate, withdraw from it by withdrawing his resignation.—*In re Dietrich's Estate*, 39 Wash. 520, 81 Pac. 1061, 1062. An executor's agreement to resign for a consideration is illegal. Such an agreement is against public policy.—*Currier v. Clark*, 19 Colo. App. 250, 75 Pac. 927. But it is well settled that the renunciation of an executor may be retracted at any time before letters have been actually granted to another.—*Estate of True*, 120 Cal. 352, 353, 52 Pac. 815. It must be presumed that an order of the probate

court, accepting the resignation of an executor or administrator, and discharging him from his trust, is regular. Such resignation can not therefore be collaterally attacked.—*Luco v. Commercial Bank*, 70 Cal. 339, 342, 11 Pac. 650; *Lucas v. Todd*, 28 Cal. 182. An executor or administrator may resign his appointment, having first settled his accounts and delivered up all the estate to the person appointed to receive the same; but if there be delay in settling the accounts and delivering the estate, or from any other cause the circumstances of the estate, or the rights of those interested require it, the court may, before the settlement and delivery is completed, revoke the letters and appoint an administrator, either general or special.—*Luco v. Commercial Bank*, 70 Cal. 339, 342, 11 Pac. 650. Although the court has no power to appoint an administrator of the estate of a deceased person until a former administrator has been removed, or his resignation accepted, the statute of California (Code Civ. Proc., sec. 1427), does not require that the resignation of a former administrator must have been accepted before the filing of the petition for the appointment of a successor. If it is necessary, under that section, that the estate be delivered up by the first administrator before a second can be appointed, it must be presumed, from a record showing the appointment of the first administrator, his resignation and its acceptance, his final accounting and its settlement, and the appointment of his successor, that such delivery was made.—*Barboza v. Pacific Portland Cement Co.*, 162 Cal. 36, 120 Pac. 767.

#### REFERENCES.

Agreement to renounce executorship is illegal when.—See note 48 *Am. Rep.* 332, 333.

4. Province and power of court.—The probate court, or its judge, as the general supervisor and guardian of estates of deceased persons, has power, by law, to suspend or remove an administrator whenever there is reason to believe, either from personal knowledge or from credible information, that such administrator has fraudulently wasted or mismanaged the estate, or is about to do so, or has become incompetent to manage it.—*Déck's Estate v. Gherke*, 6 Cal. 666, 669; *In re Baldrige*, 2 Ariz. 299, 15 Pac. 141, 143; *Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456, 459. The court by which an executor or administrator is appointed has a very large discretion in determining whether, upon the facts presented to it, the officer shall either be suspended or removed.—*Estate of Healy*, 137 Cal. 474, 476, 70 Pac. 455. A court, after appointing an administrator, has authority to revoke the appointment, not for the purpose of appointing a successor, but for the sole purpose of ending an unnecessary administration.—*Murphy v. Murphy*, 42 Wash. 142, 84 Pac. 646, 648. The superior court of California, as a court of probate, has the supervision of the estates of deceased persons, and is vested with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the

protection of the estate and that power is not to be interfered with by the appellate court, if it does not appear that its discretion has been abused; and where its findings and the evidence supporting the same appear to justify its action, this court will not review the same upon appeal.—*In re Newell*, 18 Cal. App. 258, 122 Pac. 1099. A county court of Oregon has jurisdiction of a petition to have a will declared void and to remove the executors.—*In re McGinnis's Estate*, *McGinnis v. Condron*, 91 Or. 407, 179 Pac. 254. Where there is reasonable ground to believe that the acts of the administrator have been in violation of his trust the county court has full authority to remove him if he is negligent with his trust or neglects to file his semi-annual accounts.—*In re Marks & Co.'s Estate*, 66 Or. 347, 133 Pac. 778. A commissioner acting in probate business may, like the county court, under the law of Oregon, either on the application of any heir, devisee, legatee, creditor, or other interested person, or on his own motion, remove an executor or administrator.—*In re Thompkins McIntire Estate*, 1 Alaska 73, 81. The statute makes no distinction between the surviving spouse, acting as representative, and any other person; such spouse may be removed for cause.—*In re Dolenty's Estate*, *Mannix v. Dolenty*, 53 Mont. 33, 161 Pac. 524. An incompetent or neglectful person administering the affairs of an estate, should be expedited as far as possible by the court, or, if found impossible of expedition, removed and replaced by some other person more suitable; even a surviving spouse, acting as representative, may be removed for grave delinquencies.—*In re Dolenty's Estate*, *Mannix v. Dolenty*, 53 Mont. 33, 161 Pac. 524. A failure to comply with the mandate of the statute requiring the filing of an inventory renders the person upon whom the obligation rests liable to removal; whether the absence of an appraiser, or an effort to obtain information as to decedent's property in another state, will excuse a representative from filing an inventory within the time directed, is for the court to determine.—*Manser's Estate*, 60 Or. 240, 244, 118 Pac. 1024. Although the provisions of section 1511 of the Code of Civil Procedure of California, taken literally, lend support to the decision of the trial court that it is mandatory upon it to revoke the letters testamentary of an executor for failure to publish notice to creditors within two months, regardless of excuse, the more reasonable view is that the legislature intended to vest the trial judge with a wise discretion in the revocation of letters, and to confer upon him the power to decline to revoke the letters if it appears that the failure to publish the notice within the statutory period is satisfactorily excused.—*Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

**5. Petition for removal.**—A petition for the removal of an administrator is insufficient if it is not presented by persons interested, or does not allege sufficient cause; but where the petition specifically states facts which, if true, conclusively show that the administrator neglected his trust within the cause defined by the statute, it is suffi-

cient.—In *re Miller's Estate*, 40 Or. 424, sub nom.; *Knight v. Hamakar*, 67 Pac. 107, 109, 110. As a general rule, where the probate court has once regularly conferred the appointment, it can not remove the incumbent, except for causes defined in the statute.—In *re Miller's Estate*, 40 Or. 424, sub nom.; *Knight v. Hamakar*, 67 Pac. 107, 110. The removal can only be for statutory cause.—*Miller v. Hider*, 9 Colo. App. 50, 47 Pac. 406, 409. Where the statute provides that letters of administration may be revoked if the administrator wastes or mismanages the estate, or conducts himself in such a manner as to endanger his co-administrators or sureties, and the language of the petition for the removal is as broad and general as that of the statute, proof of any waste or mismanagement is admissible; but if the petitioner signally fails to establish either waste or mismanagement, it is error for the court to remove the administrator.—*Miller v. Hider*, 9 Colo. App. 50, 47 Pac. 406, 409. When an administrator appears in proceedings for his removal, based on a neglect of his duty, and submits an excuse for his neglect, without objecting to the sufficiency of the petition, he thereby waives any objection to the petition on the ground that it does not allege that his neglect to publish notice of his appointment, or to file an inventory within the time required by law, has resulted or would result in probable loss to the petitioner, or that the facts which constitute the claim of the petitioners as creditors are not averred, or that the person whom the court is asked to appoint is not a resident of the county.—In *re Barnes' Estate*, 36 Or. 279, 59 Pac. 464, 465. A demurrer lies to a petition to remove an executor or administrator.—*Estate of Carter*, 16 Haw. 784.

6. *Suspension*.—Where the statute provides that an order must be made, suspending the powers of an administrator whenever the judge "has reason to believe, from his own knowledge or from credible information," that the facts named in the statute as reason for such order exist, the implication is, that the court is at liberty to examine and consider the "information," for the purpose of determining whether it is "credible," or affords any reason to believe in the truth of the facts alleged. Hence where an application has been filed for the removal of an administrator, and for the revocation of his letters of administration, upon the ground that he has mismanaged the estate, and neglected his duties as administrator thereof, and each of the facts alleged in the petition is distinctly denied by the administrator, the court is not required to make an order of suspension until the truth of the informer's allegations shall have been established.—*Estate of Healy*, 137 Cal. 474, 476, 70 Pac. 455. The judge may suspend the powers of an executor for various causes designated in the statute, one of which is, that if any executor has permanently removed from the state, it then becomes the duty of the judge to cite the executor to appear and show cause why his letters should not be revoked. If he appears, and the court is satisfied that there exists cause for the removal, his letters must be revoked, but it is not necessary that the

court first suspend the executor before citing him to appear and show cause why his letters should not be revoked. The suspension looks to the removal of the executor, and is a step toward it, but not a necessary one. Usually the ground of suspension would justify removal, but the former takes place without a hearing, while the latter can not. As it becomes the duty of the court to issue a citation after its suspension, there seems to be no reason why it may not reach the ultimate object—removal—by direct proceedings.—*Estate of Kelley*, 122 Cal. 379, 382, 55 Pac. 136.

7. What is cause for removal.—The court has power to vacate the appointment of an executor or administrator which has been inadvertently granted.—*Raine v. Lawlor*, 1 Cal. App. 483, 82 Pac. 688, 689; or where he is not entitled to administration.—*Koury v. Castillo*, 13 N. M. 26, 79 Pac. 293, 295. Charges which, if believed by the court, may be ground for suspending the representative, are, if proved upon a hearing, ground for removing him.—*Estate of Rathgeb*, 125 Cal. 302, 308, 57 Pac. 1010. An executor who has no business capacity, who made no effort to collect debts said to be due to the estate, or to find whether in fact they were valid claims of the deceased against the alleged debtors, who never read and did not know the contents of affidavits attached to his reports, who did not know the amount of money due the estate, who mismanaged the affairs of the estate, and who was found, in general, to be incompetent to act as executor, may properly be removed.—*In re Courtney's Estate*, 31 Mont. 625, 79 Pac. 317, 318. An executor may always be removed after his appointment, unless he discharges the duty of his trust faithfully and as directed by law.—*Estate of Bauquier*, 88 Cal. 302, 313, 26 Pac. 178, 532. He may be removed, on the application of an heir or other person interested in the estate, for unfaithfulness or neglect to the probable loss of the applicant; or the court may, for like cause, upon its own motion, remove such officer; but in either instance he must be cited to appear and show cause why such action should not be taken, and is thereby accorded a hearing in the premises.—*In re Partridge's Estate*, 31 Or. 297, 51 Pac. 82, 84. If he neglects for four years to file an inventory, or to cause the estate to be appraised, or to give the statutory notice to creditors, and has neglected to require verified vouchers to be presented for money of the estate his account shows he has paid out, such facts abundantly justify his removal, especially where it further appears that he has temporarily removed from the state, and does not have a residence therein.—*In re Dietrich's Estate*, 39 Wash. 520, 81 Pac. 1061, 1062. Where he has been authorized to sell the real property belonging to the estate for cash, has made a sale thereof under the power conferred, and has falsely reported that he had received the cash therefor, and the court, relying thereon, has confirmed the sale in pursuance of which the administrator has delivered a deed of the premises to the purchaser, such conduct conclusively shows that the administrator has "neglected" his trust, within the cause defined

by the statute.—In re Miller's Estate, 40 Or. 424, sub nom.; Knight v. Hamakar, 67 Pac. 107, 110. An executor or administrator may be removed for mismanagement and neglect of the estate, where it appears that he has assumed conflicting duties, or where antagonistic interests disqualify him from acting as executor or administrator.—Estate of Bell, 135 Cal. 194, 196, 67 Pac. 123; Mills' Estate, 22 Or. 210, sub nom. Mills v. Mills, 29 Pac. 443, 444. Thus if the administrator fails to include in his inventory certain personal property, which he claims to have purchased from the heirs, it is apparent that there is a direct conflict in interest between the estate and the administrator, and he can not act indifferently in the matter.—Mills' Estate, 22 Or. 210, sub nom. Mills v. Mills, 29 Pac. 443, 444. So if an executor acts as agent of the mortgagee, and allows the mortgage to be foreclosed, and the sale of the property made to the mortgagee, without interposing any defense to the action, his duties to the estate and to such agent are necessarily conflicting to some extent, and the executor should be removed for permitting such sale, especially where it appears that the mortgaged property was worth twice the amount of the mortgage.—Estate of Bell, 135 Cal. 194, 195, 67 Pac. 193. It is the duty of the executor or administrator to state in his inventory the interest of the estate in property, and to have that interest appraised. If he refuses to do so, it is the duty of the court, in its discretion, to remove him.—Mesmer v. Jenkins, 61 Cal. 151, 154; In re Holladay's Estate, 18 Or. 168, 22 Pac. 750, 751; In re Barnes' Estate, 36 Or. 279, 59 Pac. 464, 465; Clancy v. McLeroy, 30 Wash. 567, 70 Pac. 1095, 1096. An executor or administrator may be removed for "unfaithfulness or neglect of his trust," to the probable loss of persons interested in the estate, where he has failed to publish the statutory notice to creditors, or to file the inventory within the time prescribed by statute.—In re Barnes' Estate, 36 Or. 279, 59 Pac. 464, 465. An executor may also be removed where he has failed for many years, without any satisfactory explanation, to wind up the administration of the estate.—Estate of Moore, 3 Cal. Unrep. 162, 22 Pac. 653, 654. One whose personal interests are in conflict with his duties as executor or administrator is not a proper person to hold the office. Thus where the estate of a deceased person is insolvent, and it appears that the decedent made a conveyance of land in his lifetime, which there is reasonable ground to believe fraudulent, the creditors have a right to insist that the executor or administrator shall proceed as directed by the statute; and if he refuses to do so, or if his personal interests are such as to prevent him from doing his official duty in this regard, he is not a suitable person to be intrusted with the duties of the office, and should be removed.—Marks v. Coats, 37 Or. 609, 62 Pac. 488, 489. An executor should be removed under the terms of section 1136, Code of Civil Procedure of California, "when he has committed or is about to commit a fraud upon the estate." The act of the executor in allowing a false claim against the estate, with full knowledge of how the claim had originated and that he had himself

created the same as a claim against the estate, for the purpose of reimbursing his sister-in-law for moneys which he himself had borrowed from her, constituted a fraud against the estate for which he was properly removed.—*Estate of Newell*, 18 Cal. App. 258, 122 Pac. 1099. The county court is authorized to remove an administrator who is negligent with his trust, or who neglects to file his semi-annual accounts.—*Marks & Co.'s Estate*, In re, 66 Or. 340, 344, 133 Pac. 777. Failure by an executor to file an inventory within one month from his appointment as required by law is sufficient grounds for his removal and an order of the county court in so removing him will not be reversed except for abuse of discretion.—*In re Manser's Estate*, 60 Or. 240, 118 Pac. 1026. Where it appears that an executor's interest conflicts with his duty as executor, the county court is authorized to remove him.—*In re Manser's Estate*, 60 Or. 240, 118 Pac. 1026. Where there is evidence tending to show that charges against an administrator of misappropriation of the property of the estate may be true, the court is justified in removing him without undertaking to determine the truth or falsity of the charges and under such circumstances some person should be in charge whose interest it will be to cause the alleged delinquencies to be thoroughly investigated.—*Bean v. Pettengill*, 57 Or. 22, 109 Pac. 805. Neglect, embezzlement, or mismanagement, held ground for revocation of letters.—*In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530.

## REFERENCES.

What are grounds for the removal of executors and administrators.—See note 138 Am. St. Rep. 525.

8. Removal of non-resident executors for absence.—In some states it is provided by statute that whenever an executor has permanently removed from the state it becomes the duty of the judge to cite the executor to appear and show cause why his letters should not be revoked. The phrase "has permanently removed from the state," in such a statute, may more properly refer to a resident executor who has permanently removed from the state, but the reason for revoking the letters in such cases applies equally to a non-resident executor who comes here to receive his appointment, and then permanently withdraws from the state and remains away. It is his permanent absence from the place where the business is to be transacted, beyond the process of the court, and where the creditors of the estate and others having business with it cannot reach him, that creates the disqualification; and this is equally true of both resident and non-resident executors. The statute should be so construed as to give ground of removal of a non-resident executor when he fails to come to this state and personally conduct the business of the estate at such times and as frequently as the interests of the estate and of those concerned in its settlement may require. And the court, exercising a sound judicial discretion, must be the judge as to what will constitute the permanent absence from the state.—*Estate of Kelley*, 122 Cal. 379, 382, 55 Pac.



136. After he has appeared and submitted himself to the jurisdiction of the court, he can not be removed from the office on the ground of his non-residence, unless he subsequently permanently removes from the state.—*Hecht v. Carey*, 13 Wyo. 154, 110 Am. St. Rep. 981, 78 Pac. 705, 707.

9. What is no cause for removal.—The removal of an executor or administrator can be made only for statutory cause.—*Miller v. Hider*, 9 Colo. App. 50, 47 Pac. 406, 409. While it is the duty of the courts to protect carefully the interests of estates, the rights of those who are appointed to take charge of and to manage them should not be overlooked; and an executor or administrator should not be removed, except for good and sufficient cause.—*Estate of Welch*, 86 Cal. 179, 183, 24 Pac. 943. The fact that he has improperly paid an attorney's fee is no ground for removal.—*Estate of Welch*, 110 Cal. 605, 42 Pac. 1089. The fact that the person who administered upon an estate was a non-resident is not such a fraud as will avoid the administration proceedings. That a person applying for letters is a non-resident is a good ground for opposing his appointment, and good cause for removing him after he has been appointed, but his acts as administrator, when once appointed, are neither void nor voidable, and can not be set aside for that reason.—*Meikle v. Cloquet*, 44 Wash. 513, 87 Pac. 841, 843. Nor can he be removed for refusing to give notice to creditors, where no possible good could have been accomplished by publishing such notice, and where no notice to creditors is necessary; as, where the estate is of less value than fifteen hundred dollars, and there are no children, and the widow is entitled to have the whole set apart to her without any further proceedings in the administration.—*Estate of Atwood*, 127 Cal. 427, 430, 59 Pac. 770. Where it is found that some of the heirs have power to act, and have made a valid and binding transaction, in which their action was subject to their own control, such as the execution of a mortgage on their interests, this is no ground for depriving the executor of his office in respect to the estate.—*In re Ming*, 15 Mont. 79, 38 Pac. 228. It is the duty of the executor to publish the notice to creditors as the law requires. He has no discretion in that regard; but if by excusable neglect he omits to do so, the burden is upon him to show such excusable neglect, and if such excuse appears and the estate has suffered no loss by reason thereof, the excuse should be accepted.—*Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012. Where it appears that the executor honestly endeavored to have the notice published, and requested his attorney to prepare and publish it, and the attorney delegated the work to his stenographer, who by oversight omitted to publish it in time, the oversight of the stenographer, though regrettable, is not of sufficient gravity to authorize the removal of the executor.—*Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012. It should be and is the policy of the law to give effect, as far as it can be legally done, to the expressed will of the deceased. The nomination of the executor is evidence of the confidence

reposed in him by the testator, and the deliberate purpose and desire thus solemnly expressed as to the administration of the estate should not be thwarted unless the plain provisions of the law or the interests of justice demand it. The provisions of the will reposing special confidence in him should not be laid out of view where there may be a question as to what the legislature intended in a provision as to the removal of an executor; and it should rather incline the court to give to the law a construction as favorable as possible to the executor, where he has not shown himself to be incompetent, corrupt or grossly negligent.—*Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012. When the purpose of the law is apparent, it should be given effect, since whatever is within the purpose of the lawmaker is as must part of the statute as if it was within the letter. To carry out the purpose of the law it is held in many cases that the words "shall" and "must" may be considered directory merely.—*Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012. The forfeiture of an office is not favored, and provisions having that effect are to be strictly construed to avoid such forfeiture; and if the statute can be reasonably interpreted to avoid the forfeiture, it should be so construed.—*Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012. Evidence held not to justify revocation of letters for mismanagement.—*In re Bottoms' Estate*, 156 Cal. 129, 103 Pac. 849. Where the executors, in a non-intervention will, have faithfully cared for and promoted the interest of all parties taking under the will, and have fully administered the estate, they can not be removed because of transactions that in no way affect any trust created by the will; before an order of removal is authorized, it must be found that some trust created by the will has not been faithfully discharged, and that some one interested has been, or is about to be, injured by such neglect of duty.—*In re Hooper's Estate*, 76 Wash. 72, 81, 135 Pac. 813. Executors, guardians, and trustees, appointed by a testator in his duly executed will, are not to be removed on petition, where the will is valid and where the petition does not allege that they have in any manner failed or neglected to discharge any of their duties arising from or growing out of their trust.—*In re McGinnis's Estate*; *McGinnis v. Condron*, 91 Or. 407, 179 Pac. 254. An administrator should not be removed for an alleged failure to include certain articles of personal property, of small value, in his inventory of an estate of large value, where, subsequent to the petition for the revocation of his letters, he files a supplemental inventory, including such articles.—*In re Blackburn's Estate*, 48 Mont. 179, 195, 137 Pac. 381.

#### REFERENCES.

Grounds for the removal of an executor or administrator.—See note 138 Am. St. Rep. 525.

10. Notice. Hearing. Evidence.—A court can not, of its own motion, remove an administrator without giving him an opportunity to be heard; and if he offers to explain a long delay in his administration,

by evidence that the administration had been prolonged by reason of litigation, it is error to reject such evidence. For the purpose of showing unavoidable delay and good faith, he has the right to introduce every paper in the case to prove the various proceedings had therein.—*Estate of Moore*, 83 Cal. 583, 586, 23 Pac. 794. Where his powers have been suspended until the matter for which he has been suspended is investigated, notice of such suspension must be given to him, and he must be cited to show cause why his letters should not be revoked. If he fails to appear in obedience to the citation, or if, appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked; but when charges against an executor or administrator are formulated in a sworn statement prior to issuing a citation to show cause, they need not be reiterated in a separate document. The provisions of the statute allowing any person interested in the estate to appear at the hearing and file charges against the representative can not be constituted as requiring charges previously made to be filed anew.—*Estate of Rathgeb*, 125 Cal. 302, 308, 57 Pac. 1010. An executrix under a "non-intervention will" may be removed, and letters testamentary be issued to some other person, on the ground that she failed to pay a certain judgment within a specified time, where the evidence warrants a finding that she had in her possession funds belonging to the estate sufficient to pay the judgment, and that it was the only claim.—*In re MacDonald's Estate*, 29 Wash. 422, 69 Pac. 1111, 1113, 1114. For evidence of an administrator's neglect of his trust sufficient to authorize his removal, see *In re Miller's Estate*, 40 Or. 424, sub nom. *Knight v. Hamakar*, 67 Pac. 107.

11. Order of removal, and its effect.—An order for the removal of an administrator is not required to be in any particular form. Hence, if he has failed to comply with the order of the court to give additional security, an order "that the right of the administrator to the administration of this estate cease" cuts off his powers and rights, and completely ousts him from office, and the order can not be attacked on the ground that it was made without notice, because no notice is required by the statute, and no notice is necessary.—*Barrett v. Superior Court*, 5 Cal. Unrep. 569, 47 Pac. 592, 593. Where three persons were joint administrators of an estate, and one of them had possession of all the funds, but was removed from the administration by the probate court, and three claims presented by him against the estate, having been passed on by the probate court, were appealed to the district court, and the other two administrators, as administrators, brought suit to recover the funds in his hands, and the case was tried before the appeals were determined, and a judgment rendered against the defendant administrator for all the funds in his hands, it was held that the remaining administrators were entitled to the possession of the funds belonging to the estate, pending the litigation on the other claims, and that, as neither party asked to have the contested claims determined in the action, the court committed no error in rendering

judgment for the full amount of the assets in the hands of the defendant, leaving the contested claims to be determined in the separate actions pending on appeal.—*Gilmore v. Gilmore*, 59 Kan. 19, 51 Pac. 891. An administrator, after the removal of another administrator, has the right to prosecute a pending appeal and to defend the action.—*Kerns v. Dean*, 77 Cal. 555, 560, 19 Pac. 817. After the letters of an executor or administrator have been revoked, his authority to act for the estate terminates, and he is divested of all power to pay any claim against it.—*Rutenic v. Hamakar*, 40 Or. 444, 67 Pac. 196, 200. Where a surviving spouse, the wife, is removed as executrix of her husband's estate, for misconduct or because of the assertion of rights adverse to the estate, she ought not to be allowed to name a successor; by taking the appointment as executrix she waived her right, in limine, to nominate some one to act in her stead.—*In re Dolenty's Estate*, *Mannix v. Dolenty*, 53 Mont. 33, 161 Pac. 524. To prove in one jurisdiction the removal of an executor by a probate court in another, the order of removal is not sufficient in itself, but there must be shown the petition therefor filed by an heir, legatee, devisee, or creditor of the estate, the notice served upon such executor, the hearing on the charges and the finding of them to be true; the order removing the executor and revoking his letters must also be shown.—*Sylvester's Admr. v. Willson's Admrs.*, 2 Alaska 325, 335.

12. Appeal.—The powers of an executor or administrator terminate at the date of his removal from office, and the administration of the estate remaining unadministered immediately devolves upon a co-executor or co-administrator, if there be one, and if not, upon the person to whom letters shall be granted; and an appeal does not restore him to that office, pending its determination, in the absence of a statute to that effect. During the pendency of the appeal, his authority is suspended, and he has no power to control or to manage the affairs of the estate until reinstated by an order of the appellate tribunal.—*Knight v. Hamakar*, 33 Or. 154, 54 Pac. 659, 660; and see *Alderman v. Tillamook County*, 50 Or. 48, 91 Pac. 298, 300. Pending the appeal of an administrator from an order removing him, he is suspended from office, and it is within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order of removal becomes final.—*Estate of Moore*, 86 Cal. 72, 73, 24 Pac. 846. When the administrator is displaced, he ceases to have either interest in or power over the estate. He thereafter ceases to have any connection with the estate, and a judgment relating to its affairs can not be rendered against him. He is as completely separated from the business of the estate as if he were dead, and has no right to appear in or be a party, in any court, to a suit which the law confides to the representative of the deceased.—*Moore v. Moore*, 127 Cal. 460, 462, 59 Pac. 823. If, after the removal of an administrator, a judgment is rendered against him, for an amount found to be due from him to the estate, and he takes an appeal from

court, accepting the resignation of an executor or administrator, and discharging him from his trust, is regular. Such resignation can not therefore be collaterally attacked.—*Luco v. Commercial Bank*, 70 Cal. 339, 342, 11 Pac. 650; *Lucas v. Todd*, 28 Cal. 182. An executor or administrator may resign his appointment, having first settled his accounts and delivered up all the estate to the person appointed to receive the same; but if there be delay in settling the accounts and delivering the estate, or from any other cause the circumstances of the estate, or the rights of those interested require it, the court may, before the settlement and delivery is completed, revoke the letters and appoint an administrator, either general or special.—*Luco v. Commercial Bank*, 70 Cal. 339, 342, 11 Pac. 650. Although the court has no power to appoint an administrator of the estate of a deceased person until a former administrator has been removed, or his resignation accepted, the statute of California (Code Civ. Proc., sec. 1427), does not require that the resignation of a former administrator must have been accepted before the filing of the petition for the appointment of a successor. If it is necessary, under that section, that the estate be delivered up by the first administrator before a second can be appointed, it must be presumed, from a record showing the appointment of the first administrator, his resignation and its acceptance, his final accounting and its settlement, and the appointment of his successor, that such delivery was made.—*Barboza v. Pacific Portland Cement Co.*, 162 Cal. 36, 120 Pac. 767.

## REFERENCES.

Agreement to renounce executorship is illegal when.—See note 48 Am. Rep. 332, 333.

4. Province and power of court.—The probate court, or its judge, as the general supervisor and guardian of estates of deceased persons, has power, by law, to suspend or remove an administrator whenever there is reason to believe, either from personal knowledge or from credible information, that such administrator has fraudulently wasted or mismanaged the estate, or is about to do so, or has become incompetent to manage it.—*Déck's Estate v. Gherke*, 6 Cal. 666, 669; *In re Baldrige*, 2 Ariz. 299, 15 Pac. 141, 143; *Ramp v. McDaniel*, 12 Or. 108, 6 Pac. 456, 459. The court by which an executor or administrator is appointed has a very large discretion in determining whether, upon the facts presented to it, the officer shall either be suspended or removed.—*Estate of Healy*, 137 Cal. 474, 476, 70 Pac. 455. A court, after appointing an administrator, has authority to revoke the appointment, not for the purpose of appointing a successor, but for the sole purpose of ending an unnecessary administration.—*Murphy v. Murphy*, 42 Wash. 142, 84 Pac. 646, 648. The superior court of California, as a court of probate, has the supervision of the estates of deceased persons, and is vested with power, in the exercise of that supervision, to remove an executor when, in its discretion, such step is necessary for the

protection of the estate and that power is not to be interfered with by the appellate court, if it does not appear that its discretion has been abused; and where its findings and the evidence supporting the same appear to justify its action, this court will not review the same upon appeal.—In re Newell, 18 Cal. App. 258, 122 Pac. 1099. A county court of Oregon has jurisdiction of a petition to have a will declared void and to remove the executors.—In re McGinnis's Estate, McGinnis v. Condrón, 91 Or. 407, 179 Pac. 254. Where there is reasonable ground to believe that the acts of the administrator have been in violation of his trust the county court has full authority to remove him if he is negligent with his trust or neglects to file his semi-annual accounts.—In re Marks & Co.'s Estate, 66 Or. 347, 133 Pac. 778. A commissioner acting in probate business may, like the county court, under the law of Oregon, either on the application of any heir, devisee, legatee, creditor, or other interested person, or on his own motion, remove an executor or administrator.—In re Thompsons McIntire Estate, 1 Alaska 73, 81. The statute makes no distinction between the surviving spouse, acting as representative, and any other person; such spouse may be removed for cause.—In re Dolenty's Estate, Mannix v. Dolenty, 53 Mont. 33, 161 Pac. 524. An incompetent or neglectful person administering the affairs of an estate, should be expedited as far as possible by the court, or, if found impossible of expedition, removed and replaced by some other person more suitable; even a surviving spouse, acting as representative, may be removed for grave delinquencies.—In re Dolenty's Estate, Mannix v. Dolenty, 53 Mont. 33, 161 Pac. 524. A failure to comply with the mandate of the statute requiring the filing of an inventory renders the person upon whom the obligation rests liable to removal; whether the absence of an appraiser, or an effort to obtain information as to decedent's property in another state, will excuse a representative from filing an inventory within the time directed, is for the court to determine.—Manser's Estate, 60 Or. 240, 244, 118 Pac. 1024. Although the provisions of section 1511 of the Code of Civil Procedure of California, taken literally, lend support to the decision of the trial court that it is mandatory upon it to revoke the letters testamentary of an executor for failure to publish notice to creditors within two months, regardless of excuse, the more reasonable view is that the legislature intended to vest the trial judge with a wise discretion in the revocation of letters, and to confer upon him the power to decline to revoke the letters if it appears that the failure to publish the notice within the statutory period is satisfactorily excused.—Estate of Chadbourne, 15 Cal. App. 363, 114 Pac. 1012.

5. *Petition for removal.*—A petition for the removal of an administrator is insufficient if it is not presented by persons interested, or does not allege sufficient cause; but where the petition specifically states facts which, if true, conclusively show that the administrator neglected his trust within the cause defined by the statute, it is suffi-

**PART V.**  
**INVENTORY AND COLLECTION OF EFFECTS OF**  
**DECEDENT**

**CHAPTER I.**

**INVENTORY, APPRAISEMENT, AND POSSESSION OF EFFECTS.**

- § 356. Inventory to include homestead.**
- § 357. Appraisement, and pay of appraisers.**
- § 358. Oath of appraisers. Inventory, how made.**
- § 359. Form. Order appointing appraisers.**
- § 360. Form. Certificate of appointment of appraisers.**
- § 361. Form. Oath of appraisers to appraise property.**
- § 362. Form. Inventory and appraisement.**
- § 363. Form. Oath of administrator as to property.**
- § 364. Form. Certificate of appraisers.**
- § 365. Form. Bill of appraisers, and oath thereto.**
- § 366. Inventory and appraisement. Money.**
- § 367. Effect of naming a debtor executor.**
- § 368. Discharge or bequest of debt against executor.**
- § 369. Oath to inventory.**
- § 370. Letters may be revoked for neglect of administrator.**
- § 371. Form. Order directing notice to show cause why letters should not be revoked for neglecting to return inventory.**
- § 372. Form. Order of removal for neglecting to file inventory.**
- § 373. Inventory of after-discovered property.**
- § 374. Form. Order to show cause why administrator should not be removed for not causing after-discovered property to be appraised and inventoried.**
- § 375. Administrator or executor to possess all real and personal estate.**
- § 376. Executor or administrator to deliver real estate to heirs or devisees when.**
- § 376.1 Joint deposits by more than one person.**
- § 377. Bank deposits of married women and minors.**
- § 377.1 Surviving heirs may collect money deposited in bank.**
- § 377.2 Collection of balances due estates of deceased annuitants from teachers' retirement salary fund.**
- § 378. Form. Affidavit to collect bank deposit of deceased depositor.**

EFFECTS OF DECEDENTS. INVENTORY, APPRAISEMENT, AND  
POSSESSION OF ESTATE.

1. Effects of decedents.
  - (1) Administration in general.
  - (2) Interference with estate. Irregular accounts.
  - (3) What are assets. In general.
  - (4) Same. Proceeds of life insurance policies.
  - (5) Same. Claim for damages.
  - (6) Same. Notwithstanding what.
  - (7) Estoppel to deny.
  - (8) What are not assets. In general.
  - (9) Same. Pension moneys.
  - (10) Same. Homestead before final proof.
  - (11) Same. Property held in trust.
  - (12) Same. Land not paid for.
  - (13) Discovery of assets.
  - (14) Collection of assets.
  - (15) Recovery of property fraudulently conveyed.
  - (16) Collection of assets by domiciliary, ancillary, or foreign executor.
  - (17) Custody and control of assets.
  - (18) Widow takes as trustee when.
  - (19) Realty. Personalty. Equitable conversion.
  - (20) Remainder in fee after homestead.
2. Inventory and appraisal.
  - (1) In general.
  - (2) Affidavit.
  - (3) Return.
  - (4) Must include what.
  - (5) Second or further inventory.
  - (6) As evidence of value.
  - (7) Appraisal.
  - (8) No estoppel from filing inventory.
  - (9) Correction of inventory, how made.
  - (10) Same. Striking homestead therefrom.
3. Possession of estate.
  - (1) Right to, and nature of.
  - (2) Statute of limitations. Loss of right.
  - (3) Domiciliary executors.
  - (4) Recovery of possession.
4. Appeal.
  - (1) In general.

## § 356. Inventory to include homestead.

Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisal of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge.—*Kerr's Cyc. Code. Civ. Proc.*, § 1443.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1633.  
 Arizona\*—Revised Statutes of 1913, paragraph 850.  
 Colorado—Mills's Statutes of 1912, sections 7955, 7956, 8039.  
 Idaho—Compiled Statutes of 1919, section 7549.  
 Kansas—General Statutes of 1915, sections 4515, 4523.  
 Montana\*—Revised Codes of 1907, section 7493.  
 Nevada—Revised Laws of 1912, section 5942.  
 New Mexico—Statutes of 1915, section 2246.  
 North Dakota—Compiled Laws of 1913, section 8714.  
 Oklahoma—Revised Laws of 1910, section 6313.



Oregon—Lord's Oregon Laws, section 1177.

South Dakota—Compiled Laws of 1913, section 5763.

Utah—Compiled Laws of 1907, section 3841.

Washington—Laws of 1917, chapter 156, page 668, section 95.

Wyoming\*—Compiled Statutes of 1910, section 5548.

**§ 357. Appraisement, and pay of appraisers.**

To make the appraisement, the court, or a judge thereof, must appoint three disinterested persons, one of whom must be one of the inheritance tax appraisers provided for by law (any two of whom may act, provided, that one of them be the inheritance tax appraiser); provided, that the court may, in its discretion, appoint said inheritance tax appraiser as sole appraiser to appraise said estate. Each of said appraisers is entitled to receive, from each estate he appraises, as compensation for his services not to exceed five dollars per day together with his actual and necessary expenses to be allowed by the court or judge. The appraisers or appraiser must, with the inventory, file a verified account of their or his services and disbursements. If any part of the estate is in any other county than that in which letters issued, an appraiser or appraisers thereof may in the same manner as above provided, be appointed, either by the court or judge having the jurisdiction of the estate, or by the court or judge of such other county, on request of the court or judge having jurisdiction. No clerk or deputy, nor any person related by consanguinity or affinity to or connected by marriage with, or being a partner or employee of the judge of the court, shall be appointed or shall be competent to act as appraiser in any estate, or matter or proceeding pending before said judge or in said court.—*Kerr's Cyc. Code Civ. Proc.*, § 1444.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 1635.

Arizona—Revised Statutes of 1913, paragraph 851.

Colorado—Laws of 1915, chapter 173, page 494; amending Mills's Statutes of 1912, section 8035.

Idaho—Compiled Statutes of 1919, section 7550.  
Kansas—General Statutes of 1915, sections 4526, 4537.  
Montana—Revised Codes of 1907, section 7494.  
Nevada—Revised Laws of 1912, section 5943.  
New Mexico—Statutes of 1915, sections 2251, 2255.  
North Dakota—Compiled Laws of 1913, section 8720.  
Oklahoma—Revised Laws of 1910, section 6314.  
Oregon—Lord's Oregon Laws, section 1179.  
South Dakota—Compiled Laws of 1913, section 5764.  
Utah—Compiled Laws of 1907, section 3842.  
Washington—Laws of 1917, chapter 156, page 668, section 95.  
Wyoming—Compiled Statutes of 1910, section 5549.

**§ 358. Oath of appraisers. Inventory, how made.**

Before proceeding to the execution of their duty, the appraisers must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each item of property must be set down separately, with the value thereof in dollars and cents, in figures, opposite the items respectively.

CONTENTS OF INVENTORY.—The inventory must contain all the estate of the decedent, real and personal, a statement of all debts, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each debt or security, the date, the sum originally payable, the indorsement thereon (if any), with their dates, and the sum which, in the judgment of the appraisers, may be collected on each debt or security; and a statement of the interest of the decedent in any partnership of which he was a member, to be appraised as a single item. The inventory must also show, so far as the same can be ascertained by the executor or administrator, what portion of the property is community property and what portion is the separate property of the decedent.—*Kerr's Cyc. Code Civ. Proc.*, § 1445.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, sections 1634, 1636.

Arizona—Revised Statutes of 1913, paragraph 852.

Colorado—Mills's Statutes of 1912, sections 7955, 8036, 8037.

Idaho—Compiled Statutes of 1919, section 7551.

Kansas—General Statutes of 1915, sections 4515, 4530-4532.

Montana—Revised Codes of 1907, section 7495.

Nevada—Revised Laws of 1912, section 5944.

New Mexico—Statutes of 1915, sections 2254, 2255.

North Dakota—Compiled Laws of 1913, sections 8714, 8717, 8720, 8721.

Oklahoma—Revised Laws of 1910, section 6315.

Oregon—Lord's Oregon Laws, sections 1166, 1178, 1180, 1181.

South Dakota—Compiled Laws of 1913, section 5765.

Utah—Compiled Laws of 1907, section 3843.

Washington—Laws of 1917, chapter 156, page 668, section 96.

Wyoming—Compiled Statutes of 1910, section 5550.

**§ 359. Form. Order appointing appraisers.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

It is hereby ordered, That —, —, and —, three disinterested persons, competent and capable to act, be, and they are hereby, appointed appraisers of the estate of —, deceased. —, Judge of the — Court.

Dated —, 19—.

Explanatory notes.—1 Give file number. This form should be attached to or printed on the inventory and appraisement.

**§ 360. Form. Certificate of appointment of appraisers.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

I, —, county clerk of the county<sup>2</sup> of —, and ex officio clerk of the —<sup>3</sup> court thereof, do hereby certify that —, —, and — were duly appointed appraisers of the estate of —, deceased, by order of the said —<sup>4</sup> court, duly entered and recorded on the — day of —, 19—.

Witness my hand and the seal of said —<sup>5</sup> court this  
— day of —, 19—. —, Clerk.

[Seal]

By —, Deputy Clerk.<sup>6</sup>

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, city and county.  
<sup>3-5</sup> Title of court. <sup>6</sup> This form should be attached to or printed on the  
inventory and appraisement.

**§ 361. Form. Oath of appraisers to appraise property.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

—, —, and —, duly appointed appraisers of the  
estate of —, deceased, being duly sworn, each for him-  
self says that he will truly, honestly, and impartially ap-  
praise the property of said estate which shall be exhibited  
to him, according to the best of his knowledge and ability.

— }  
— } Appraisers.  
— }

Subscribed and sworn to before me this — day of  
—, 19—. —, Deputy County Clerk.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, city and county. This  
form should be attached to or printed on the inventory and appraise-  
ment.

**§ 362. Form. Inventory and appraisement.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Inventory and Appraisement of the Property of the  
Estate of —, Deceased.

Real Estate.

[Give specific description, location, and value of each  
parcel.]

Personal Property.

Moneys belonging to the said deceased, which have

come to the hands of the administrator,<sup>2</sup> — dollars (\$—).

Total value of property, — dollars (\$—).

All of the property mentioned in the foregoing inventory is community<sup>3</sup> property.<sup>4</sup>

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, executor. <sup>3</sup> Or, separate property, according to the fact. <sup>4</sup> The inventory and appraisement should have attached to it, or printed thereon, the following six forms: (1) Order appointing appraisers. (2) Certificate of appointment of appraisers. (3) Oath of appraisers to appraise property. (4) Oath of administrator or executor as to property. (5) Certificate of appraisers. (6) Bill of appraisers, and oath thereto.

**§ 363. Form. Oath of administrator as to property.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

State of —, }  
County<sup>2</sup> of —, } ss.

—, administrator<sup>3</sup> of the estate of —, deceased, being duly sworn, says that the annexed inventory contains a true statement of all the estate of said deceased which has come to the knowledge and possession of said —, administrator,<sup>4</sup> and particularly of all money belonging to the said deceased, and of all just claims of the said deceased against the said affiant.

Subscribed and sworn to before me this — day of —, 19—. —, Deputy County Clerk.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, City and County. <sup>3</sup>, <sup>4</sup> Or, executor. This oath must be indorsed on or annexed to the inventory and appraisement. See § 369, post.

**§ 364. Form. Certificate of appraisers.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

We, the undersigned, duly appointed appraisers of the estate of —, deceased, hereby certify that the property mentioned in the foregoing inventory has been exhibited

to us, and that we appraise the same at the sum of — dollars (\$—).

Dated this — day of —, 19—.

— }  
— } Appraiser.<sup>2</sup>  
— }

Explanatory notes.—1 Give file number. 2 This form should be annexed to or printed on the inventory and appraisement.

**§ 365. Form. Bill of appraisers, and oath thereto.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Estate of —, Deceased.

To —, —, and —, Appraisers, Dr.  
To compensation for services in appraising said estate.

Items as follows:

— days' service, at \$— per day, each..... \$—

Necessary disbursements, as follows: —<sup>2</sup>..... —

Total ..... \$—

State of —, }  
County <sup>3</sup> of —, } ss.

—, —, and —, the appraisers above named  
being duly sworn, each for himself says that the foregoing bill of items is correct and just, and that the services have been duly rendered as herein set forth.

— }  
— } Appraisers.  
— }

Subscribed and sworn to before me this — day of —, 19—. —, Deputy County Clerk.

Explanatory notes.—1 Give file number. 2 Itemize them. 3 Or, City and County. This form should be attached to or printed on the appraisement and inventory.

session, and particularly of all money belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory.—*Kerr's Cyc. Code Civ. Proc.*, § 1449.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1637.  
 Arizona\*—Revised Statutes of 1913, paragraph 856.  
 Colorado—Mills's Statutes of 1912, section 8037.  
 Idaho\*—Compiled Statutes of 1919, section 7555.  
 Kansas—General Statutes of 1915, sections 4536, 4538.  
 Montana\*—Revised Codes of 1907, section 7499.  
 Nevada\*—Revised Laws of 1912, section 5947.  
 New Mexico—Statutes of 1915, section 2246.  
 North Dakota—Compiled Laws of 1913, section 8715.  
 Oklahoma\*—Revised Laws of 1910, section 6319.  
 Oregon—Lord's Oregon Laws, sections 1180, 1181.  
 South Dakota\*—Compiled Laws of 1913, section 5769.  
 Utah—Compiled Laws of 1907, section 3844.  
 Washington—Laws of 1917, chapter 156, page 668, section 96.  
 Wyoming\*—Compiled Statutes of 1910, section 5553.

#### § 370. Letters may be revoked for neglect of administrator.

If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall, for reasonable cause, allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.—*Kerr's Cyc. Code Civ. Proc.*, § 1450.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 857.  
 Idaho\*—Compiled Statutes of 1919, section 7556.  
 Kansas—General Statutes of 1915, sections 4539-4541.  
 Montana\*—Revised Codes of 1907, section 7500.  
 Nevada—Revised Laws of 1912, section 5948.  
 New Mexico—Statutes of 1915, section 2241.  
 Oklahoma\*—Revised Laws of 1910, section 6320.

South Dakota\*—Compiled Laws of 1913, section 5770.

Washington—Laws of 1917, chapter 156, page 669, section 99.

Wyoming—Compiled Statutes of 1910, section 5554.

**§ 371. Form. Order directing notice to show cause why letters should not be revoked for neglecting to return inventory.**

[Title of court.]

[Title of estate.]

{ No. —, <sup>1</sup> Dept. No. —.  
[Title of form.]

It appearing to the court that —, the administrator <sup>2</sup> of the above-entitled estate, has neglected to return the inventory of such estate within the time prescribed by law,<sup>3</sup> —

It is ordered, That the clerk of this court cause notice to be served on the said — to show cause before the court, at the court-room thereof,<sup>4</sup> on —,<sup>5</sup> the — day of —, 19—, at — o'clock in the forenoon<sup>6</sup> of said day, why he should not be removed from his office of administrator<sup>7</sup> of said estate, because of such failure.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, executor, etc., according to the fact. <sup>3</sup> Or, within such further time, not exceeding two months, as the court or judge shall, for reasonable cause, allow. <sup>4</sup> Give department, if any, and location of court-room. <sup>5</sup> Day of week. <sup>6</sup> Or, afternoon. <sup>7</sup> Or, executor, according to the fact.

**§ 372. Form. Order of removal for neglecting to file inventory.**

[Title of court.]

[Title of estate.]

{ No. —, <sup>1</sup> Dept. No. —.  
[Title of form.]

It being shown to the court that —, administrator <sup>2</sup> of the estate of —, deceased, neglected to return the inventory of such estate within the time prescribed by law;<sup>3</sup> that notice to show cause why he should not be removed from his office as administrator<sup>4</sup> for such failure was served upon the said —; and that said administrator<sup>5</sup> failed to show cause at the time and place prescribed in said notice, or otherwise, —



It is ordered, That the letters of administration <sup>6</sup> heretofore granted to the said —, as administrator <sup>7</sup> of the estate of —, deceased, be, and the same are hereby, revoked; that — be, and he is hereby, appointed administrator <sup>8</sup> of said estate; and that letters of administration <sup>9</sup> issue to him upon his taking the oath, and giving a bond in the sum of — dollars (\$—), with sureties, to be approved by the judge of this court.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2 Or, executor, etc., according to the fact. 3 Or, within such further time, not exceeding two months, as the court or judge shall, for reasonable cause, allow. 4, 5 Or, executor, etc., according to the fact. 6 Or, letters testamentary. 7, 8 Or, executor, as the case may be. 9 Or, letters testamentary.

### § 373. Inventory of after-discovered property.

Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.—*Kerr's Cyc. Code Civ. Proc.*, § 1451.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

- Alaska—Compiled Laws of 1913, section 1640.
- Arizona\*—Revised Statutes of 1913, paragraph 858.
- Colorado—Mills's Statutes of 1912, section 7956.
- Idaho—Compiled Statutes of 1919, section 7557.
- Kansas—General Statutes of 1915, section 4545.
- Montana\*—Revised Codes of 1907, section 7501.
- Nevada—Revised Laws of 1912, section 5949.
- New Mexico—Statutes of 1915, section 2247.
- North Dakota—Compiled Laws of 1913, section 8722.
- Oklahoma\*—Revised Laws of 1910, section 6321.
- Oregon—Lord's Oregon Laws, section 1184.
- South Dakota\*—Compiled Laws of 1913, section 5771.
- Utah—Compiled Laws of 1907, section 3841.
- Washington—Laws of 1917, chapter 156, page 669, section 100.
- Wyoming\*—Compiled Statutes of 1910, section 5555.

**§ 374. Form. Order to show cause why administrator should not be removed for not causing after-discovered property to be appraised and inventoried.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

It being shown to the court <sup>2</sup> that the inventory made and filed in the said estate does not mention certain personal property, to wit, —; <sup>3</sup> that said personal property has come to the knowledge and possession of —, the administrator <sup>4</sup> of said estate; and that he has not, within two months after such discovery, caused such property to be appraised in the manner prescribed by law, and an inventory thereof to be returned to this court, —

It is ordered, That the clerk of this court cause notice to be served upon the said — to show cause before this court, at the court-room thereof, <sup>5</sup> on —, <sup>6</sup> the — day of —, 19—, at — o'clock in the forenoon <sup>7</sup> of said day, why he should not be removed as administrator <sup>8</sup> of said estate for such failure.

It is further ordered, That said notice be served at least — days before the time set for hearing, and that a copy of the affidavit <sup>9</sup> be served with said notice.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> By affidavit of —; or otherwise. <sup>3</sup> Give detailed description and value. <sup>4</sup> Or, executor, etc., according to the fact. <sup>5</sup> Give number of department, if any, and location of court-room. <sup>6</sup> Day of week. <sup>7</sup> Or, afternoon. <sup>8</sup> Or, executor, as the case may be. <sup>9</sup> If one is used.

**§ 375. Administrator or executor to possess all real and personal estate.**

The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled or until delivered over by the order of the court to the heirs or devisees; and must keep

in good tenantable repair all houses, buildings, and fixtures thereon which are under his control.

**NOT TO RECOVER FROM HEIR WHEN.**—After the expiration of the time for the presentation of claims, he is not entitled to recover the possession of any property of the estate from any heir, who has succeeded to the property in his possession or from any devisee, or legatee, to whom the property has been devised or bequeathed, or from the assignee of any such heir, devisee, or legatee, unless he proves that the same is necessary for the payment of debts or legacies, or of expenses of administration already accrued, or for distribution to some other heir, devisee, or legatee entitled thereto.

**HEIRS MAY SUE TO RECOVER ESTATE.**—The heirs of devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do.—*Kerr's Cyc. Code Civ. Proc.*, § 1452.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1641.

Arizona—Revised Statutes of 1913, paragraph 859.

Colorado—Mills's Statutes of 1912, section 7939. Dividends, on stock of foreign corporations, owned by deceased are to be paid to executor or administrator. Laws of 1915, chapter 60, page 176.

Idaho—Compiled Statutes of 1919, section 7558.

Montana—Revised Codes of 1907, section 7502.

Nevada—Revised Laws of 1912, section 5950.

North Dakota—Compiled Laws of 1913, sections 8707, 8797.

Oklahoma—Revised Laws of 1910, section 6322.

Oregon—Lord's Oregon Laws, section 1185.

South Dakota—Compiled Laws of 1913, section 5772.

Utah—Compiled Laws of 1907, section 3912.

Wyoming—Compiled Statutes of 1910, section 5556.

#### § 376. Executor or administrator to deliver real estate to heirs or devisees when.

Unless it satisfactorily appear to the court that the rents, issues, and profits of the real estate for a longer

period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees.—*Kerr's Cyc. Code Civ. Proc.*, § 1453.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 860.

Idaho\*—Compiled Statutes of 1919, section 7559.

Montana\*—Revised Codes of 1907, section 7503.

Oklahoma\*—Revised Laws of 1910, section 6323.

South Dakota—Compiled Laws of 1913, section 5773.

Utah\*—Compiled Laws of 1907, section 3951.

#### § 376.<sup>1</sup> Joint deposits by more than one person.

When a deposit is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business.—*Kerr's Cyc. Civ. Code*, § 1828.

#### § 377. Bank deposits of married women and minors.

When any deposit with a bank shall be made by or in the name of any married woman or minor, the same shall be held for the exclusive right and benefit of such depositor, and free from the control or lien of all other persons, except creditors, and shall be paid, together with the dividends, if any, and interest, if any, thereon to the person in whose name deposits shall have been made, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge for such deposit, or any part thereof, to the bank.

DEPOSITS IN TRUST.—When any deposit with a bank shall be made by any person in trust for another, and no

other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to such bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest, if any, thereon, may be paid to the person for whom the deposit was made. When a deposit with a bank shall be made by any person in the names of such depositor and another person or persons, and in form to be paid to either or the survivor or survivors of them, such deposit thereupon and any additions thereto made by either of such persons upon the making thereof, shall become the property of such person as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the lifetime of all or any or to the survivor or survivors after the death of one or more of them, and such payments and the receipt or acquittance of the one to whom such payment is made shall be valid and sufficient release and discharge to said bank for all payments made on account of such deposit.

**WITHDRAWAL OF DEPOSITS OF DECEASED PERSONS.**—The surviving husband or wife, or the guardian of the estate of any insane or incompetent husband or wife of any deceased person, or, if no husband or wife is living, then the children or the guardian of the estates of any minor or insane or incompetent children of said decedent, or, if no children are living, then the father or mother or guardian of the estate of any insane or incompetent father or mother of such decedent, and if neither the father or mother is living, then the brothers and sisters or the guardian of the estates of any minor or insane or incompetent brothers and sisters of such decedent, may, without procuring letters of administration, collect of any bank any sum which said deceased may have left on deposit, in such bank at the time of his or her death;

provided, such deposit shall not exceed the sum of one thousand dollars.

**AFFIDAVIT.**—Any bank, upon receiving an affidavit stating that said depositor is dead, and that affiant is the surviving husband or wife or the guardian of the estate of an insane or incompetent surviving husband or wife, as the case may be, of said decedent, or stating that said decedent left no husband or wife, and that affiant is, or affiants are, the children, or the guardians of the estates of the minor, insane, or incompetent children, as the case may be, of said decedent, or stating that said decedent left neither husband, wife, nor children, and that affiant is the father or mother, or the guardian of the estate of the insane or incompetent father or mother, as the case may be, of said decedent, or stating that the decedent left neither husband, wife, children, father, nor mother, and that affiants are the brothers and sisters or the guardians of the estates of the minor, insane, or incompetent brothers and sisters, as the case may be, of said decedent, and that the whole amount that decedent left on deposit in any or all banks of deposits of this state, does not exceed the sum of one thousand dollars, may pay to said affiant or affiants, any deposit of said decedent, if the same does not exceed the sum of one thousand dollars, and the receipt of such affiant is sufficient acquittance therefor; provided, however, that whenever the affidavit herein mentioned is made by any guardian it shall be accompanied by a certified copy of the letters of guardianship issued to such guardian attached to a certificate of the clerk of the court having appointed such guardian to the effect that the said letters of guardianship have not been revoked. Cal. Stats. 1915, ch. 612, p. 1139, sec. 16 of the "Bank Act," as amended.

**§ 377.<sup>1</sup> Surviving heirs may collect money deposited in bank.**

The surviving husband or wife, or the guardian of the estate of any insane or incompetent husband or wife, of

any deceased person, or if no husband or wife is living, then the children, or the guardian of the estates of any minor or insane or incompetent children of said deceased, or, if no children are living, then the father or mother or guardian of the estate of any insane or incompetent father or mother of such decedent, and if neither the father nor mother is living, then the brothers and sisters or the guardian of the estates of any minor or insane or incompetent brothers and sisters of such decedent, may, without procuring letters of administration, collect of any bank any sum which said deceased may have left on deposit in such bank at the time of his or her death; provided, such deposits shall not exceed the sum of one thousand dollars.

**AUTHORITY OF BANK TO PAY.**—Any bank, upon receiving an affidavit stating that said depositor is dead, and that affiant is the surviving husband or wife or the guardian of the estate of an insane or incompetent surviving husband or wife, as the case may be, of said decedent, or stating that decedent left no husband or wife, and that affiant is the child, or that affiants are the children, or the guardians of the estates of the minor, insane or incompetent children, as the case may be, of said decedent, or stating that decedent left neither husband, wife nor children, and that affiant is the father or mother, or the guardian of the estate of the insane or incompetent father or mother, as the case may be, of said decedent, or stating that the decedent left neither husband, wife, children, father nor mother, and that affiants are the brothers and sisters, or the guardians of the estates of the minor, insane or incompetent brothers and sisters, as the case may be, of said decedent, and that the whole amount that said decedent left on deposit in any and all banks of deposit in this state, does not exceed the sum of one thousand dollars, may pay to said affiant or affiants any deposit of said decedent, if the same does not exceed the

sum of one thousand dollars, and the receipt of such affiant or affiants, is sufficient acquittance therefor.—*Kerr's Cyc. Code Civ. Proc.*, § 1454.

**§ 377.<sup>2</sup> Collection of balances due estates of deceased annuitants from teachers' retirement salary fund.**

The surviving husband or wife, or the guardian of the estate of any insane or incompetent husband or wife, of any deceased person who had been the recipient of an annuity from the public school teachers' retirement salary fund, or if no husband or wife is living, then the children or the guardian of the estates of any minor or insane or incompetent children of said deceased, or, if no children are living, then the father or mother or the guardian of the estate of any insane or incompetent father or mother of such decedent, and if neither the father nor mother is living, then the brothers and sisters or the guardian of the estates of any minor or insane or incompetent brothers and sisters of such decedent, may, without procuring letters of administration, collect from the public school teachers' retirement salary fund, in the state treasury, any balance of retirement salary accrued to the credit of said deceased annuitant remaining unpaid at the time of death.

**PAYMENT OF CLAIM ON RECEIPT OF AFFIDAVIT.**—The public school teachers' retirement salary fund board, upon receiving an affidavit stating that said annuitant is dead, and that affiant is the surviving husband or wife or the guardian of the estate of an insane or incompetent husband or wife, as the case may be, of said decedent, or stating that decedent left no husband or wife, and that affiant is the child, or that affiants are the children, or the guardians of the estates of the minor, insane or incompetent children, as the case may be, or of said decedent, or stating that decedent left neither husband, wife nor children, and that affiant is the father or mother, or



the guardian of the estate of the insane or incompetent father or mother, as the case may be, of said decedent, or stating that the decedent left neither husband, wife, children, father nor mother, and that the affiants are the brothers and sisters, or the guardians of the estates of the minor, insane or incompetent brothers and sisters, as the case may be, of said decedent, shall, at the next quarterly meeting of said board, when claims for retirement salaries are certified, include, and certify a claim in favor of said affiant or affiants for the balance due said decedent, and the controller shall draw his warrant in favor of the affiant or affiants in the same manner as warrants are drawn for the payment of retirement salaries, and the indorsement of such affiant or affiants upon such warrant is sufficient acquittance therefor.—*Kerr's Cyc. Code Civ. Proc.*, § 1455.

**§ 378. Form. Affidavit to collect bank deposit of deceased depositor.**

State of —, }  
County of —, } ss.

—,<sup>1</sup> being duly sworn, deposes and says: That —<sup>2</sup> was a depositor in the —<sup>3</sup> bank; that said — is now dead; that she died at —,<sup>4</sup> on or about the — day of —, 19—; that affiant is the surviving husband;<sup>5</sup> and that the whole amount that said decedent left on deposit in any and all banks of deposit in this state does not exceed the sum of five hundred dollars (\$500).

Affiant therefore asks that all moneys on deposit to the credit of said decedent in said bank may be paid to —,<sup>6</sup> according to the statute.

Subscribed and sworn to before me this — day of —, 19—. —, Notary Public, etc.<sup>7</sup>

**Explanatory notes.**—<sup>1</sup> Give name or names of affiants. <sup>2</sup> Give name of deceased depositor. <sup>3</sup> Give name of bank. <sup>4</sup> Give name of place of death. <sup>5</sup> Or, is the surviving wife, of the deceased depositor; or, that said deceased depositor left no surviving husband or wife, and that

affiant is, or affiants are, the only surviving child or children of said deceased depositor. <sup>6</sup> Affiant; or as the case may be. <sup>7</sup> Or other officer taking the oath. See Cal. Stats. 1895, p. 32; Henning's General Laws, p. 440.

EFFECTS OF DECEDENTS. INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.

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| <p><b>1. Effects of decedents.</b></p> <p>(1) Administration in general.</p> <p>(2) Interference with estate. Irregular accounts.</p> <p>(3) What are assets. In general.</p> <p>(4) Same. Proceeds of life insurance policies.</p> <p>(5) Same. Claim for damages.</p> <p>(6) Same. Notwithstanding what.</p> <p>(7) Estoppel to deny.</p> <p>(8) What are not assets. In general.</p> <p>(9) Same. Pension moneys.</p> <p>(10) Same. Homestead before final proof.</p> <p>(11) Same. Property held in trust.</p> <p>(12) Same. Land not paid for.</p> <p>(13) Discovery of assets.</p> <p>(14) Collection of assets.</p> <p>(15) Recovery of property fraudulently conveyed.</p> <p>(16) Collection of assets by domiciliary, ancillary, or foreign executor.</p> <p>(17) Custody and control of assets.</p> | <p>(18) Widow takes as trustee when.</p> <p>(19) Realty. Personalty. Equitable conversion.</p> <p>(20) Remainder in fee after homestead.</p> <p><b>2. Inventory and appraisement.</b></p> <p>(1) In general.</p> <p>(2) Affidavit.</p> <p>(3) Return.</p> <p>(4) Must include what.</p> <p>(5) Second or further inventory.</p> <p>(6) As evidence of value.</p> <p>(7) Appraisement.</p> <p>(8) No estoppel from filing inventory.</p> <p>(9) Correction of inventory, how made.</p> <p>(10) Same. Striking homestead therefrom.</p> <p><b>3. Possession of estate.</b></p> <p>(1) Right to, and nature of.</p> <p>(2) Statute of limitations. Loss of right.</p> <p>(3) Domiciliary executors.</p> <p>(4) Recovery of possession.</p> <p><b>4. Appeal.</b></p> <p>(1) In general.</p> |
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**1. Effects of decedents.**

(1) Administration in general.—“The rights of creditors to the assets of a deceased person's estate is the principal reason for requiring official administration, and courts therefore sanction the disposition of the property of a decedent without the appointment of an administrator, where it is certain that no debts are owing.”—*Murphy v. Murphy*, 42 Wash. 142, 84 Pac. 646, 648, quoting *Woerner's Law of Administration*, sec. 201. In Kansas, no administration of the personal estate of an intestate is necessary, when there are no creditors. The heirs, in such case, may divide the assets of the estate among themselves, in kind or otherwise, by mutual agreement. When so divided, each will become the owner in severalty of the portion so received.—*Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574; but administration seems to be necessary to establish the existence of creditors or heirs; and whatever may be the law in other jurisdictions, there is nothing in the probate law of California which would, either expressly or by impli-

cation, exempt the property of a decedent from the requirement of administration. The whole subject-matter of dealing with the assets of deceased persons is, however, one of statutory regulation, and the policy and intent of the statute very clearly contemplates that property of a decedent, left undisposed of at death, except in the instance of the homestead acquired under certain circumstances as provided by the statute, shall, for the purposes of ascertaining and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court. Indeed, there is no other method provided by the statute whereby the existence of creditors or heirs of decedents may be conclusively established, and such administration may be initiated and had at the instance of any person entitled under the law to administer upon the estate.—*Estate of Strong*, 119 Cal. 663, 665, 51 Pac. 1078. And the provisions of the probate law all look to a speedy close of administration. Thus the executor or administrator must collect all debts due to the estate; the debts of the decedent, if there are funds for the purpose, are to be paid within a comparatively brief time after the administration of the estate begins; and, as soon as the estate is in proper condition to be closed, the administrator must render a final account and pray final settlement. The object of probate proceedings is to administer, settle, and distribute the estates of deceased persons, and the whole statutory system provided therefor contemplates that this object shall be accomplished with reasonable dispatch.—*Maddock v. Russell*, 109 Cal. 417, 423, 42 Pac. 139. But the probate laws of California have no application to the estates of persons who died before their passage, because, under the Mexican law previously enforced, the heir succeeded immediately to the estate, and became personally answerable for the debts of the decedent.—*Coppinger v. Rice*, 33 Cal. 408; *Ryder v. Cohn*, 37 Cal. 69, 90; *McNeil v. First Congregational Society*, 66 Cal. 105, 4 Pac. 1096. Administration on the estate of a living person is void.—*Fay v. Costa*, 2 Cal. App. 240, 244, 83 Pac. 275. It was decided in *Scott v. McNeal*, 5 Wash. 309, 34 Am. St. Rep. 863, 31 Pac. 873, 874, as against a living person, that he was dead, and that the probate court had power to dispose of his estate; but this case was reversed on writ of error.—See *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. 1108. Administration may lawfully be had on the estate of a dead person, but not upon that of one living. Until death occurs, there is "no subject-matter" over which it is possible to exercise jurisdiction. It is true that the court of probate, before issuing letters of administration, must determine affirmatively the question of death; but, notwithstanding such determination, the fact that the supposed intestate is alive may still be shown, and when shown, it establishes the nullity of the entire proceedings.—*Stevenson v. Superior Court*, 62 Cal. 60, 61. Where it is made to appear to the satisfaction of the court that the sole assets of an estate consist of an equitable claim or demand, letters of administration may issue, on

application, in advance of a suit in equity to test the claim.—*Estate of Daughaday*, 168 Cal. 63, 141 Pac. 929.

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Probate of will or letters of administration, when void for want of jurisdiction.—See note 33 Am. Dec. 239-243. Power to administer a living person's estate.—See note § 216, headline 14, subd. 10, ante. What assets will give jurisdiction to appoint administrator.—See note 24 L. R. A. 684-689.

(2) *Interference with estate. Irregular accounts.*—Where a person or corporation, before the granting of letters of administration, sells or alienates any of the property of the decedent which is covered by a chattel mortgage, he or it is chargeable therewith, and liable to an action by the administrator of the estate for double the value of the property so sold or alienated.—*Litz v. Exchange Bank*, 15 Okla. 564, 83 Pac. 790. The public officers of a county have no right to dispose of the money of a deceased person, except in the manner authorized by the statute. If all the essential requirements of the statute are not followed, the rights of the legal representative of such money will remain unaffected. Thus where the coroner is required by the statute to deliver the money or effects found on the body of a deceased person to the county treasurer, the treasurer has no authority to pay over a sum so delivered to him to the administrator without an order of the county court, where the statute makes such order a prerequisite to such payment.—*Chow v. Brockway*, 21 Or. 440, sub nom.; *Oh Chow v. Brockway*, 28 Pac. 384, 387. The law does not contemplate that the claims of an administrator for reimbursement for moneys expended before his appointment can be established by his uncontradicted evidence.—*Estate of Heeney*, 3 Cal. App. 548, 86 Pac. 842, 844. If the debtor of an estate makes an unauthorized payment to the administrator thereof, such payment does not discharge the debtor from his liability to the estate. The money so paid by him is his own, and not that of the estate, and the debtor, but not the estate, can recover the same of the administrator.—*McCoy v. Ayres*, 2 Wash. Ter. 307, 5 Pac. 843, 844. Executor held not to succeed to powers or duties of decedent as administratrix.—*Sanford v. Bergin*, 156 Cal. 43, 103 Pac. 333.

(3) *What are assets. In general.*—The certainty that a right of property is vested in a definitely ascertained person, not the value of that right nor the time when it may be enjoyed, determines the question whether that right is an asset of which a court may make judicial disposition.—*Markham v. Waterman* (Kan.) 181 Pac. 621, 623. The term "assets," as applied to the estates of decedents, means property, real or personal, tangible or intangible, legal or equitable, which can be made available for or may be appropriated to the payment of debts.—*Barnard v. Bilby* (Okla.), 171 Pac. 444, 446. The right to an annuity payable out of the income of a trust fund, is personal property, and is distributable, upon the death of the annuitant intestate

according to the laws of the country where the decedent had his domicile at the time of his death.—*Hawaiian Trust Co. v. McMullan*, 23 Haw. 685, 693. A probate clerk who, upon the formation of a new county, makes transcripts from the records of an old county, is entitled to the folio rate upon printed as well as written folios, where, although using printed forms he must compare and often correct and interline them.—*Summers v. Commissioners*, 15 N. M. 376, 380, 110 Pac. 509. Where the sons of a testator have a present right or interest in property bequeathed, although their enjoyment thereof is postponed until their mother's death, such right or interest of each son, not being exempt property, will pass to a trustee in bankruptcy as part of a bankrupt son's estate.—*Markham v. Waterman* (Kan.), 181 Pac. 621, 623. If two men own all of the stock of a mining corporation, except one share issued to a third person to qualify him as a director, and one of them bequeaths his stock in trust for certain parties, after which the company's property is sold and the proceeds divided between the two main owners of stock, the property received by each is his own, and if the one who made a will dies such property so received by him is a part of his estate, to be distributed in accordance with the provisions of the will.—*In re Wilson's Estate*, 85 Or. 604, 167 Pac. 580; *Mackin v. Noad*, 86 Or. 221, 167 Pac. 585. A debt due from an executor or administrator to a decedent is an asset in his hands, applicable to the payment of debts.—*United States v. Egglestone*, 4 Saw. 199, Fed. Cas. No. 15,027. When he has been charged, upon the settlement of his accounts, with a personal debt he owed the deceased, whether by virtue of a statute, as in Oregon, or without a statute, as in some other jurisdictions, the sureties on his bond are bound for the payment thereof, and insolvency or inability to pay is no defense.—*United Brethren First Church, etc., v. Akin*, 45 Or. 247, 2 Ann. Cas. 353, 66 L. R. A. 654, 77 Pac. 748. The debt of an administrator to the estate represented by him is to be reckoned as so much money on hand, for which his sureties are answerable.—*In re Marks' Estate*, 81 Or. 632, 639, 160 Pac. 540, 542. A judgment is an asset of the estate for the purpose of administration.—*Low v. Horner*, 10 Haw. 531, 535. The rents and profits of real property belonging to a decedent are assets of his estate.—*Washington v. Black*, 83 Cal. 290, 295, 23 Pac. 300; *Head v. Sutton*, 31 Kan. 616, 3 Pac. 280, 282; and the rents of mortgaged property are general assets of the estate, on which the mortgage is not a lien, and in which it is entitled to no preference under the statute giving a preference to mortgage debts. Such statute limits the preference to the proceeds arising from the property mortgaged, either upon a foreclosure sale or a sale by the administrator.—*Estate of McDougald*, 146 Cal. 196, 202, 79 Pac. 875. In a general sense, every part of the estate which comes under the law to an executor or administrator is an asset.—*Washington v. Black*, 83 Cal. 290, 295, 23 Pac. 300. The general rule of law is well settled, that, for the purpose of founding administration, all simple contract debts are assets at the domicile of

the debtor, and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable.—*Moore v. Jordan*, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337, 339; citing *Wyman v. United States (Halstead)*, 109 U. S. 564, 654, 27 L. Ed. 1068, 3 Sup. Ct. Rep. 417; and other authorities. If an appeal bond has been given in an action to recover property alleged to belong to an estate, and the heirs sue on such bond, and recover judgment, such judgment should be paid to the administrator as an asset of the estate, though the administrator refused to bring an action to recover the property of the estate.—*Bem v. Shoemaker*, 10 S. D. 453, 74 N. W. 239, 240, 241. A retail liquor license is property which passes to personal representatives on the death of the holder as against third persons unlawfully converting the same to their own use.—*Jaffe v. Pacific Brewing & Malting Co.*, 69 Wash. 308, 124 Pac. 1122. It is duty of an administrator to maintain the right of the estate to trust property, until it has been judicially determined that it does not belong to estate, and to account for it to his successor.—*Elizalde v. Murphy*, 11 Cal. App. 32 103 Pac. 904. Upon the death of the mortgagee, the mortgage with the indebtedness secured, like other choses in action, becomes a personal asset in the hands of his administrator.—*Fehringer v. Martin*, 22 Colo. App. 634, 126 Pac. 1131, 1133. A decedent's widow who, in order to pay an estate debt, has given the creditor her individual note secured by a chattel mortgage, is not, after subsequently being made administratrix, estopped to testify that the mortgaged chattels belonged to the estate, and not to herself.—*First State Bank v. Braden*, 39 S. D. 53, 55, 162 N. W. 929. If a clerk of court is made the depository of money by a person mistakenly thinking it due the estate of a decedent and in expectation of proceedings in the court looking to the settlement of the estate, such person has control of the money; it does not belong to such estate.—*State v. Langan*, 36 Nev. 577, 585, 142 Pac. 631.

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The subject of debts owing by executors or administrators to the estate is discussed in a note to 132 Am. St. Rep. 230. Effect of appointment of debtor as executor or administrator to discharge debt, or change personal representative and his sureties.—See note 26 L. R. A. (N. S.) 411.

(4) *Proceeds of life insurance policies.*—At common law, the executor or administrator was the legal beneficiary in all policies of insurance payable to the insured. The policy descended to him. Our system differs, in that personalty descends to the heirs, with a special interest in the administrator. But, so far as affects this question, the difference is purely ideal. In either case, the personal representative

must collect and administer upon it. Although set apart under the statute, the money is administered upon, and until so set apart, is a part of the estate. The order setting it apart is a species of distribution.—*Estate of Miller*, 121 Cal. 353, 354, 53 Pac. 906; see *Yore v. Booth*, 110 Cal. 238, 52 Am. St. Rep. 81, 42 Pac. 808; see subd. 5, *infra*, showing what are not assets. If a policy of life insurance is payable to and collected by the estate of a deceased person, the estate is the beneficiary, and the money is exempt from execution. It is therefore an asset of the deceased exempt from execution, and is properly set apart to the widow as being so exempt.—*Holmes v. Marshall*, 145 Cal. 777, 780, 104 Am. St. Rep. 86, 79 Pac. 534, 2 Ann. Cas. 88, 69 L. R. A. 67. The proceeds of life insurance policies payable to the legal representatives of the insured are subject to testamentary disposition; the words "legal representatives" mean ordinarily "executors or administrators."—*German-American State Bank v. Godman*, 83 Wash. 231, 145 Pac. 221. The sum payable on a life insurance policy after the death of the insured is not his property, within the meaning of the constitutional provision fixing a rule for the interpretation of insurance policies in which the term "heirs," "representatives," or "estate" is used to designate the beneficiary.—*Farmers State Bank v. Smith*, 36 N. D. 225, 230, 162 N. W. 302. The proceeds of an insurance policy are, however, no part of the assets of the estate, where the proceeds of such policy are payable to the widow and children; and the executors have no right to collect such proceeds.—*Heydenfeldt v. Jacobs*, 107, Cal. 373, 377, 40 Pac. 492; and see *Swift v. San Francisco Stock, etc., Board*, 67 Cal. 567, 8 Pac. 94, 102. A benefit certificate in a mutual benefit society is not an asset of the deceased member's estate.—*Burke v. Modern Woodmen*, 2 Cal. App. 611, 84 Pac. 275, 276. The proceeds of an insurance policy payable to the "legal heirs" of an intestate, collected by an administrator, are not assets of the estate. The money does not belong to the creditors. It belongs to the heirs, and the administrator should pay it to them.—*Estate of Scrimgeour*, 17 Haw. 122, 125.

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Who are "legal representatives" within the meaning of life insurance policies.—See note 30 L. R. A. 609, 32 L. R. A. (N. S.) 247.

(5) Same. Claim for damages.—A claim for damages by one who has sustained personal injuries from the negligence or wrongful act of another, is an asset of the estate, justifying an appointment of an executor or administrator.—*Missouri Pac. Ry. Co. v. Bennett's Estate*, 5 Kan. App. 231, 47 Pac. 183. The fund recovered by the personal representative of a deceased person, for negligence causing the latter's death, is the property of the estate.—*Olston v. Oregon, etc., Ry. Co.*, 52 Or. 343, 20 L. R. A. (N. S.) 915, 96 Pac. 1095, 1097, 97 Pac. 538; see *In re Lowham's Estate*, 30 Utah 436, 85 Pac. 445, 446; *Southern Pac. Co. v. Wilson*, 10 Ariz. 162, 85 Pac. 401, 403. A right of action to recover damages for being put off a train is property for which

letters of administration may be granted in the county in which an action for the recovery of such damages brought by him was pending at decedent's death even though he is a non-resident and leaves no other property in the state.—*Forrester v. Southern Pacific Co.*, 36 Nev. 247, 48 L. R. A. (N. S.) 1, 134 Pac. 753, 757, 136 Pac. 705. The employers' liability act of Oregon, of 1910, Laws of 1911, page 16, is a survival statute and an action can be brought under section 4 of that act in case of loss of life, without the necessity and expense of the appointment of an administrator; and, unlike the provision in section 380, L. O. L., the amount of recovery is unlimited; the proceeds of judgment also take a different direction; they do not go to the estate of the decedent, but direct to the beneficiary.—*McClagherty v. Rogue River Electric Co.*, 73 Or. 135, 136, 140 Pac. 64, 144 Pac. 569. In an action for injuries resulting in death, whether brought under section 380 of Lord's Oregon Laws, or under the employers' liability act of 1910, Laws of 1911, page 16, the measure of damages is the same.—*McClagherty v. Rogue River Electric Co.*, 73 Or. 135, 136, 140 Pac. 64, 144 Pac. 569. The damages recoverable in an action for injuries to a person received through the wrongful act of another are, when such action is revived, after the death of the plaintiff, only such as were sustained by the injured person in his lifetime, such as accrued between the injury and his death, and when recovered are assets of his estate, and are not for the benefit of the widow and next of kin, except as they may take as heirs upon the final distribution of the estate.—*St. Louis & S. F. R. Co. v. Goode*, 42 Okla. 784, L. R. A. 1915E, 1141, 142 Pac. 1185. The damages recovered in the new cause of action for personal injuries, created by the statute of Oklahoma and prosecuted for the exclusive benefit of the beneficiaries named in such statute, do not become assets of the decedent's estate; nor will a recovery for the benefit of the widow and next of kin bar a recovery for the benefit of the estate of the decedent, on account of the suffering and loss the decedent sustained through the injuries wrongfully inflicted on him, where death was not instantaneous.—*St. Louis & S. F. R. Co. v. Goode*, 42 Okla. 784, L. R. A. 1915E, 1141, 142 Pac. 1185.

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Right of action for the negligent killing of a person is an asset of his estate.—See note 1 L. R. A. (N. S.) 885. What assets pass to the administrator de bonis non.—See note 40 L. R. A. 71-74; see subd. 8, post.

(6) Same. Notwithstanding what.—Where two creditors of decedent's estate, after the death of an intestate, enter into an oral contract, whereby one of them agrees to pay all the debts and expenses of administration in consideration that the other creditor will acknowledge payment of a judgment against said estate, and of the heirs of the estate conveying a certain tract of land to such judgment creditor, and also conveying other lands to the creditor, who further agrees



to pay the other debts and expenses of administration after all of such conveyances have been made in accordance with said contract, such contract, after it has been ratified by the heirs making the conveyances as required by it, becomes an asset of the estate, it being made for the benefit thereof.—*Stewart v. Rogers*, 71 Kan. 53, 80 Pac. 58. Where a husband takes notes, securities, or real estate in the name of his wife, that fact, alone and unexplained, raises the presumption that he intended the same as a gift to or provision for her, but such presumption may be overcome by evidence which shows a motive or design on the part of the husband inconsistent with such presumed intent, and that such property was so placed in his wife's name for purposes of convenience and advantage to himself; and, in an action to have property standing in the wife's name declared to be the property of her deceased husband, and to be disposed of as such, where the court concludes, upon the evidence, that the money, notes, and securities described in the plaintiff's complaint were placed in the wife's name by the husband for purposes of advantage and convenience to himself, and not with the intention or for the purpose of making a gift to her or settlement upon her, the same belong to and should be distributed as a part of the estate of the deceased husband.—*Bem v. Bem*, 4 S. D. 138, 55 N. W. 1102. Where there is an attempt to make a disposition of property to take effect after death, which can only be done by a properly executed will, and there is nothing in the instrument to show any present vested interest or estate in the property in controversy, such property, after death, becomes an asset of the decedent's estate, and may be recovered by his administrator.—*Demartini v. Allegretti*, 146 Cal. 214, 218, 79 Pac. 871; it is only those things in which the decedent had a beneficial interest at his death which are assets, not those which he holds in trust, or as a bailee or factor of another. Property held in trust by the intestate remains that of the cestui que trust.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 76.

(7) *Estoppel to deny*.—An executor or administrator is estopped to deny that rents collected and received by him are assets of the estate.—*Kothman v. Markson*, 34 Kan. 542, 9 Pac. 218, 223; but where an administratrix recovers judgment in an action commenced by her intestate as a trustee, she is not estopped, as against the creditor of the estate, from setting up that the funds recovered are not the property of the estate. A trust fund, not being an asset of the estate, is a fund in which the creditor of the estate is not interested.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 77.

(8) *What are not assets*. In general.—A gift made to the widow of a decedent personally, by his former employers, is not an asset of the estate, whether she knew it was a gift to her or not.—*Estate of Stevens*, 83 Cal. 322, 324, 17 Am. St. Rep. 252, 23 Pac. 379. Property which was disposed of in decedent's lifetime by a valid gift causa mortis

is not an asset of the estate, and in such a case there is no legal objection to a delivery to an agent or trustee for the donor, although the donee does not, at the time, declare his acceptance thereof. It is sufficient if he avails himself of the provision when it becomes known to him, even subsequently to the decease of the donor.—*Denaff v. Helms*, 42 Or. 161, 70 Pac. 390, 392. So where land of the estate has been sold at private sale, and not at public sale, as directed in the order of sale, the purchaser's deposit of purchase money with the executor is not received by the executor in his representative capacity, and is not an asset of the estate; for, the sale being void on the face of the record, the executor had no right to demand or to receive such deposit.—*Schlicker v. Hemenway*, 110 Cal. 579, 581, 52 Am. St. Rep. 116, 42 Pac. 1063. Neither are damages recovered by an administrator for the death of decedent, caused by neglect, assets of the estate. Such damages are for the benefit of the heirs.—*Munro v. Pacific Coast Dredging, etc., Co.*, 84 Cal. 515, 528, 18 Am. St. Rep. 248, 24 Pac. 303. Section 2269 of the Revised Statutes of the United States provides that "where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same. But the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a payment and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned." The title thus given by the patent is not to the estate of the decedent, but, by the terms of the section, the patent shall "cause the title to inure to such heirs." The heirs do not take the title by descent from their ancestor, but the land is conveyed to them directly from the United States, by virtue of the privilege of purchase given to them expressly by the provisions of this section. The land is not subject to devise by the pre-emptor, nor can it be sold in satisfaction of his debts, or for the expenses of administration. *Wittenbrock v. Wheadon*, 128 Cal. 150, 152, 79 Am. St. Rep. 32, 60 Pac. 664. If a probate homestead has been set apart for the use of the family of the deceased, it ceases to be a part of the assets of the estate.—*Estate of Orr*, 29 Cal. 101, 104; *Estate of Burns*, 54 Cal. 223, 228; *Estate of Hamilton*, 120 Cal. 421, 426, 52 Pac. 708. So the right to the use of a homestead assigned to the innocent party in divorce proceedings does not constitute an asset of the estate of such party.—*Neary v. Godfrey*, 102 Cal. 338, 341, 36 Pac. 655. Partnership property is an asset of the firm, and subject to the exclusive management and control of the surviving partner. It is not an asset of the estate in the hands of the administrator.—*Tompkins v. Weeks*, 26 Cal. 50, 66; *Theller v. Such*, 57 Cal. 447, 459. The assets which passed to the executor or administrator in such cases consist of the individual estate of the decedents. Partnership assets, as such, form no part of

such individual estate; the residuum only, after satisfying liabilities and advances, if any, made by the survivor, becomes the property of the estate.—*Andrade v. Superior Court*, 75 Cal. 459, 463, 17 Pac. 531; *Theller v. Such*, 57 Cal. 447, 459. Property held by a trustee or fiduciary officer is not an asset of the estate in the hands of his executors, administrators, or assignees.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 76; *Pierce v. Robinson*, 13 Cal. 116; see *Swift v. San Francisco Stock, etc., Board*, 67 Cal. 567, 8 Pac. 94, 101. If goods, money, or securities belonging to another person lie among the goods of the deceased, capable of identification, and they come together to the hands of the personal representative, such other person's things are not to be reckoned among assets of the estate. Nor is money collected by an attorney, factor, or agent, and kept distinct and unmixed with the rest of the property.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 76; citing *Schouler on Executors and Administrators*, 3d ed., sec. 205. The homestead allotment of a minor Creek freedman, who died April 22, 1908, is not subject to the payment of the debts of the decedent, and is therefore not assets of his estate.—*Barnard v. Bilby (Okla.)*, 171 Pac. 444, 446. Where husband and wife have agreed that all the property held or acquired by either or both shall be owned by them as joint tenants, and so from time to time deposit their separate earnings in bank to their joint account, property into which these deposits are converted, need not, on the death of the husband, be accounted for as assets of his estate by the wife in her capacity of administratrix, if there are no children.—*Estate of Harris*, 169 Cal. 725, 147 Pac. 967. If the defendant dies after judgment has been entered against him, and execution issued on the judgment and property taken in execution, such property becomes no part of the estate to be administered, unless the judgment is reversed. Section 7209, Revised Statutes.—*Catlin v. Vandergrift*, 58 Colo. 289, 294, 144 Pac. 894. The administrator of the estate of a deceased probate clerk who made transcripts for the use of a new county from the records of the old county from which it was formed, can not recover for such estate for work done on said transcripts by himself after the death of decedent.—*Summers v. Commissioners*, 15 N. M. 376, 380, 110 Pac. 509.

(9) **Same. Pension moneys.**—Under the amendment of 1907 to section 10 of the act creating the Veterans' Home a state institution, pension money in the possession of a member of the home at the time of his death and not disposed of by will is subject to the trust therein declared, and the board of directors of the home are entitled to retain the same as against the administrator of the estate of the deceased member, to be reclaimed by certain designated relatives within one year from death, otherwise to inure to the common benefit of the members of the home, subject to future reclamation by such relatives within five years.—*Brownlee v. Veterans' Home*, 22 Cal. App. 207, 132 Pac. 1158. Where an applicant for admission to the State Veterans' Home

on March 20, 1903, was lawfully required to deposit all pension moneys with the state treasurer, and to agree to be governed not only by the laws of the state and the rules of the board then existing, but also by all amendments to such laws and rules and he died subsequent to the amendment of March 16, 1907, and to an amended rule in pursuance thereof, requiring all pension moneys of a deceased member not disposed of by will to be distributed without probate, to a widow, minor children, or dependent mother or father, in the order named within five years, and if no such relative appears within that time the same shall escheat to the state, there can be no administration of pension moneys of a member dying intestate.—*Treadway v. Board of Directors of Veterans' Home*, 14 Cal. App. 75, 111 Pac. 111.

(10) *Homestead before final proof.*—Where the heirs of a deceased homestead entryman make final proof on the land originally entered by the decedent and procure title from the government whereby the land is conveyed "unto the heirs of" the decedent, the title vests directly in the parties who are the legal heirs of the deceased and does not inure to the benefit of the estate of the deceased and the probate court has no jurisdiction over such property and no power nor authority to order a sale thereof and the administrator of the estate of the deceased has no power nor authority to convey any title to such property.—*Council Improvement Co. v. Draper*, 16 Idaho 541, 102 Pac. 7. Lands patented by the United States government to the heirs of a deceased person are no part of the estate of the deceased, and can not be sold by the probate court to pay his debts and the costs and charges of administration.—*Byerly v. Eadie*, 95 Kan. 400, 403, 148 Pac. 757.

(11) *Same. Property held in trust.*—Property held by decedent in trust is not part of his estate and can not be administered as such.—*Elizalde v. Murphy*, 11 Cal. App. 32, 103 Pac. 904. That an administrator is also individually liable to the owner of a trust fund held by decedent does not release him or his sureties from his primary obligation incurred as administrator.—*Elizalde v. Murphy*, 11 Cal. App. 32, 103 Pac. 904.

(12) *Same. Land not paid for.*—A parcel of land, sold but not paid for as yet and for which no deed has yet passed, is, on the death of the owner intestate, real property, and does not pass into the hands of the executor.—*Pickens v. Campbell*, 104 Kan. 425, 179 Pac. 343.

(13) *Discovery of assets.*—Under the statute of the state of Washington, where a person is charged with concealing the assets of a decedent, it is the court which cites such person to appear, and it is the court who may examine him on oath upon the matters suggested in the complaint. The object of the statute is to elicit testimony for the purpose of furnishing the administrator with sufficient knowledge on which to base a formal complaint against the defendant. The defendant is not, in such case, entitled to any more than the statute accords him,

and it does not accord him, either in terms or by necessary implication, the right to a formal procedure in such a case. The statute does not require that all the interrogatories shall be reduced to writing and submitted before the answering of any of them.—*Main v. Hadfield*, 41 Wash. 504, 84 Pac. 12, 14.

#### REFERENCES.

Summary proceedings to discover or recover property of estates of decedents.—See note 115 Am. St. Rep. 208-219.

(14) *Collection of assets.*—The executor or administrator shall take into his possession all the estate of the deceased, real and personal, and shall collect all debts due to the deceased. Money on deposit in a bank to the credit of the deceased may not constitute a "debt," in a strict technical sense. But whether it be so or not, the statute contemplates that the executor or administrator shall reduce into his possession, with all reasonable dispatch, the property of the estate; and if he finds money on deposit, even though the bank is one of admitted safety and of undoubted credit, he must be allowed to exercise his discretion, in good faith, as to the propriety of reducing the money into his actual possession, so as to be ready to meet any exigency in the affairs of the estate.—*Estate of McQueen*, 44 Cal. 584, 589. Assets can not be collected upon distribution of the estate.—*Estate of Cook*, 77 Cal. 220, 232, 233, 11 Am. St. Rep. 267, 1 L. R. A. 567 17 Pac. 923, 19 Pac. 431; *Estate of Smith*, 108 Cal. 115, 122, 40 Pac. 1037; and the court has no power to attempt to make such collection by making an improper deduction from the distributive share of the devisee.—*Estate of Smith*, 108 Cal. 115, 122, 40 Pac. 1037. If debts are evidenced by negotiable promissory notes, and such notes are, at the time of decedent's death, situated in a designated county in one state, and the same are there taken possession of by the administrator of the estate in that county, and by him duly accounted for to the proper court, such notes are properly payable in that state, and any moneys paid upon them would be rightfully paid to such administrator therein; and the fact that certain of these notes are secured by mortgages on real estate in another state would not change the rights of the holder thereof.—*McCoy v. Ayres*, 2 Wash. Ter. 307, 5 Pac. 843, 845. The California statute of set-offs relates to the situation of the parties "at the commencement of the action," and the death of one of the parties to the demand, though such death occurs before the maturity of the demand, does not change the relative rights of the parties in pleading a counterclaim, or in compensating the claims so far as they equal each other, provided the set-off be due when the action is commenced. Thus in an action by an executor to recover from a bank the amount of a deposit made by the decedent, the defendant who had loaned the decedent money on a note, which matured after the death of the decedent, and before the commencement of an action by the executor, has the right to use the note as a counterclaim,

and the two demands, so far as they equal each other, are to be deemed "compensated."—*Ainsworth v. Bank of California*, 119 Cal. 470, 471, 63 Am. St. Rep. 135, 39 L. R. A. 686, 51 Pac. 952. It is said in the dissenting opinion of Beatty, C. J., in *Murphy v. Clayton*, 114 Cal. 526, 529, 43 Pac. 613, 46 Pac. 460, that the law does not authorize an executor or administrator "to commence an action for which there is no apparent necessity. He can not sue to recover assets for the estate, unless it appear that there is an actual deficiency of assets. But when he has property in his hands which was in the possession of the intestate at the time of his death, and which has regularly devolved upon him,—property which, if necessary, is applicable to the purposes of administration,—it is his duty to retain the possession until it appears that it will not be needed." On the other hand, if the administrator, when he commences an action to recover assets, must show a necessity for their recovery, by parity of reasoning the party who seeks by an action to deprive him of assets should at least be required to show that they will not be needed for purposes of administration. If such property is not needed for purposes of administration, the vendee of the decedent has an ample remedy in the probate court without action; if it is needed for purposes of administration, he has no right to the property. His position with respect to it is no better than that of an heir with respect to the unsold property of the estate of the intestate. It is his, if not needed for payment of debts, and, like the heir, he should wait till the fact is ascertained.—*Murphy v. Clayton*, 114 Cal. 526, 530, 43 Pac. 613, 46 Pac. 460, per Beatty, C. J., dissenting. In an action by an administrator to recover upon a note and to foreclose a mortgage belonging to the estate, the mortgagor can not defeat recovery on any of the following grounds: That the administrator was not related to or a creditor of the decedent and was appointed less than twenty days after death, without citation to next of kin to appear and take or renounce administration; that the action was begun without an order of the court; that the money due on the note was not needed for the payment of debts and one of the heirs desired to be set off to him by an order of distribution.—*Ekblad v. Hanson*, 85 Kan. 541, 117 Pac. 1028.

(15) **Recovery of property fraudulently conveyed.**—An executor has the same right and power to bring an action to set aside a deed made by the testator in fraud of creditors as creditors would have had against the grantee and the testator in his lifetime.—*Daniels v. Spear*, 65 Wash. 121, 117 Pac. 738. Approval of claim of representative by judge of superior court, as per section 1510 of the Code of Civil Procedure of California, takes the place of the allowance by an administrator within section 1589 of that code, requiring judgments or allowance of claims by representative, before latter can sue to recover property fraudulently conveyed by decedent.—*Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. Facts and circumstances held not to charge with laches administratrix suing to recover lands fraudulently transferred by decedent, for

purpose of having it applied in satisfaction of her claim against estate of husband, it not appearing that any one was prejudiced by the delay. *Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. Where a debtor conveyed property in alleged fraud of creditors, creditors can not, after his death, bring an action to set aside the conveyance without first having applied to the court for an order directing the administrator to bring the action, as provided by sections 1589, 1590 of the Code of Civil Procedure of California.—*Beswick v. Churchill*, 22 Cal. App. 404, 134 Pac. 722. Administratrix, sole creditor, may sue to recover realty fraudulently conveyed by decedent, section 1589 of the Code of Civil Procedure of California, making it her duty to recover for benefit of creditors all such lands.—*Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. On the death of a debtor, leaving no estate but having made a fraudulent conveyance, a creditor may have an administrator appointed and responding to a notice to creditors duly given, may file his proved claim with him; on the claims being allowed and the allowance approved, he may then sue, for the benefit of himself and other holders of allowed claims, to have the conveyance set aside, the property after recovery, to be held subject to administration.—*Johnson v. Rutherford*, 28 N. D. 87, 100, 147 N. M. 390. The omission of the word "as" in the title of an action by an administrator is cured by clear and distinct averments in the complaint showing that the action is not brought by the administrator in his individual capacity, but as the duly qualified and acting administrator of the estate to recover moneys claimed to belong to the estate, and alleged to have been demanded by him, "as such administrator," and to have been refused to be delivered to him "as such administrator."—*Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261. In an action by a surviving husband suing as the heir and administrator of the wife to recover land held by defendant under a deed from the wife, declarations made by the wife after the execution of the deed that she had given it and that her grantee owned the premises, were admissible as against her interest.—*Allen v. Shires*, 47 Colo. 439, 107 Pac. 1072. As a general rule it is only the executor or administrator who can litigate for the recovery of the property of the estate. An exception, however, exists when the representative himself by collusion with the debtor or otherwise obstructs the course which the law establishes for the transmission of the estate to the heir. Under such circumstances the latter may join as defendants both the personal representative and the debtor.—*Hillman v. Young*, 64 Or. 73, 129 Pac. 125. Evidence of voluntary transfer of all property before death held to sustain finding of insolvency.—*Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. Evidence held to show fraudulent transfer.—*Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

#### REFERENCES.

Relief from fraudulent conveyances after death of grantor is the subject of a note in 135 Am. St. Rep. 329.

(16) Collection of assets by domiciliary, ancillary, or foreign executor.—It is the duty of a domiciliary administrator to take reasonable means, under existing circumstances, for collecting and realizing the assets out of his jurisdiction, and it is the duty of the court to compel him to account for wilful neglect to perform such duty; and all the authorities agree that the residuum of the foreign assets must finally be collected and distributed by the domiciliary executor.—Estate of Ortiz, 86 Cal. 306, 315, 21 Am. St. Rep. 44, 24 Pac. 1034. If there be assets in another state or states than that in which the principal letters are granted, an administration may be obtained there, and such administration will be regarded as ancillary to the administration of the domicile, and, as a general rule, the excess of the assets resulting from such ancillary administration, after the payment of local debts, expenses of administering, and local legacies, if any, in the jurisdiction of the ancillary administration, will be transmitted to the administrator of the domicile, to be there distributed according to the law of vicinage.—Estate of Apple, 66 Cal. 432, 6 Pac. 7; McCully v. Cooper, 114 Cal. 258, 261, 55 Am. St. Rep. 66, 35 L. R. A. 492, 46 Pac. 82. An ancillary administrator, in this state, may recover from the domiciliary administrator, who is temporarily here, the possession of assets of the estate. The very object of the ancillary or local administration in this state is to collect the assets of the estate here locally situated, and it is the bounden duty of the ancillary administrator so to collect them, and to pay therefrom the demand of local creditors, if any there be. Whether there are any such creditors can only be determined by giving the notice to creditors required by our law.—McCully v. Cooper, 114 Cal. 258, 263, 35 L. R. A. 492, 55 Am. St. Rep. 66, 46 Pac. 82. Nor has the domiciliary executor, as against the ancillary administrator, any power to dispose of the personal property which has its situs in a foreign jurisdiction, where an ancillary administrator has been appointed. Even at common law, where an ancillary administrator has been appointed in a foreign jurisdiction, the title to personal property which has its situs in such foreign country is in the ancillary administrator. This must necessarily be so. There can not be two independent administrations of the same property, nor could it be tolerated that the domiciliary administrator should be able practically to nullify the administration in a foreign country by assigning the personal property there situated.—Murphy v. Crouse, 135 Cal. 14, 17, 87 Am. St. Rep. 90, 66 Pac. 971. Foreign executors can not sue in California without first having obtained ancillary letters testamentary or of administration.—Lewis v. Adams (Cal.), 8 Pac. 619, 620; though he may sue personally here on a foreign judgment.—Lewis v. Adams, 70 Cal. 403, 59 Am. Rep. 423, 11 Pac. 833; and he may sue, as mortgagee, under the terms of a mortgage, to recover a trust fund, without taking out letters testamentary in the jurisdiction within which the mortgaged property is situated.—Fox v. Tay, 89 Cal. 339, 350, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897. If there be



assets of the estate of the testator in this state, administration may be had, the administrator having power to reduce the same to possession by suit or otherwise, and if the testator was a non-resident, the administration would be treated as ancillary, and after the payment of the local debts and expenses the surplus may, by order of the court, be delivered to the executor or administrator of the domicile, and to that end the executor or administrator of the domicile may doubtless apply to the court, in this state, for such order. But beyond that no authority over such assets here seems to have been given to the executor or administrator of the domicile.—*Lewis v. Adams* (Cal.), 8 Pac. 619, 621. Although a foreign executor may have no coercive power in the collection of assets in the jurisdiction in which he resides, yet if assets situated in that jurisdiction come into his possession by a voluntary payment or administration, he is bound to account for them in the domiciliary jurisdiction.—*Fox v. Tay*, 89 Cal. 339, 348, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897. Where an administrator who is also sole heir at law removed property of the estate from another state to the state where the administration proceedings were pending and afterward an administrator was appointed in that other state who brought proceedings against the first administrator for a return of the property, held that the return ought to have been ordered on the ground of comity and justice as well as a proper regard for the rights of creditors in the sister state and the fact that the property had not been inventoried by the first administrator was no reason for refusing to order the return.—*Moore v. Ingram*, 46 Colo. 204, 102 Pac. 1071. Under section 100, Indian Territory Statutes of 1899 (Sec. 43, Mansf. Dig. Ark.), an administrator de bonis non may proceed at law against his delinquent predecessor and his sureties, or either of them, to recover any part of the estate the preceding administrator may have in his possession.—*Shipman v. Brown*, 36 Okla. 623, 130 Pac. 603. Section 1667 of the Code of Civil Procedure of California, providing that where it is necessary in order that distribution may be made according to the will, the estate in this state should be delivered to the executor in the state of his residence, the court may order such delivery, is not a mandate upon the court but vests in it merely a discretion so to do.—*Estate of Lathrop*, 165 Cal. 243, 131 Pac. 752. As a general rule the domicile of the decedent draws to it in contemplation of law all the personal property of the decedent no matter where its actual situs may be at the time of his death, and the distribution of it is governed and controlled by the laws of succession existing at the place of the domicile of the decedent; provided there is no rule to the contrary in the state where the personal property is actually located.—*Estate of Hodges*, 170 Cal. 492, L. R. A. 1916A, 837, 150 Pac. 344.

(17) *Custody and control of assets.*—The custody of the assets of an estate is in the executor or administrator, and not in the court. There is no law which authorizes a probate judge to direct him where and how he shall keep the assets of an estate, and surely there ought to

be no such law. The representative is liable for their safety on his bond. If the court could lawfully take charge of them, it would deprive interested parties of this security. If goods are lost, it may be a question whether they have been properly cared for. If they have been placed where the judge has directed, and then lost, he will have prejudged the case before the trial. Executors and administrators can not be deprived of the actual custody of the assets of an estate by such an order.—*Estate of Welch*, 110 Cal. 605, 608, 42 Pac. 1089. Property and all assets of the decedent pass to his heirs, subject to a right of possession in the executor or administrator for purposes of administration only.—*Maddock v. Russell*, 109 Cal. 417, 422, 42 Pac. 139. But the representative of the estate has no right to give its assets away, even though he may consider them worthless, and his attorney has no right to receive such a gift from his hands.—*Estate of Radovich*, 74 Cal. 536, 5 Am. St. Rep. 466, 16 Pac. 321, 322. It is settled law that when an administrator has been supplanted by another, the latter is at once entitled to the unadministered assets.—*Galloway v. Freeburg*, 97 Kan. 765, 156 Pac. 766. If an administrator dies leaving assets of the estate unadministered, his successor is not restricted to an action against his sureties.—*Galloway v. Freeburg*, 97 Kan. 765, 767, 156 Pac. 766. Upon the death of an administrator, the administrator de bonis non becomes vested with title to such assets of the estate as remained unadministered and unconverted; and it is for him, and not the administrator of the administrator, to administer these assets.—*Griffith v. James*, 91 Wash. 607, 158 Pac. 251.

(18) *Widow takes as trustee when.*—The aid of a court of equity may be invoked to have certain land adjudged to be the property of the estate of a decedent, where the widow holds the legal title; and the court can not be held to have abused its discretion because it does not proceed to close the estate and settle the administration after determining that the title is in the estate, and that the widow holds as trustee for the estate. It is proper for the court to allow those matters to reach their natural termination in the tribunal and proceeding in which they are pending.—*Burton v. Burton*, 79 Cal. 490, 21 Pac. 847, 848, stating facts under which the widow will be held to take as trustee for the estate.

(19) *Realty. Personality. Equitable conversion.*—A contract for the sale of real estate, which is valid and enforceable in equity, operates as a conversion. The vendor's interest thereafter, in equity, is in the unpaid purchase price, and is treated as personality; the vendee's interest is in the land, and is realty. Upon the death of the vendor, his interest passes to his executors as personality, and continues as such for the purposes of administration.—*Clapp v. Tower*, 11 N. D. 556, 93 N. W. 862. Real estate acquired by an administrator in obtaining satisfaction of judgments forming a part of the assets of the estate in his hands for settlement is to be treated for purposes of administra-

tion as personal property.—*Weir v. Bagby*, 72 Kan. 67, 7 Ann. Cas. 702, 82 Pac. 585. Where a person dies intestate, having a title or interest in lands, for a term of years, such interest is, under the statute of Colorado, to be regarded and treated as real estate by the administrator.—*McKee v. Howe*, 17 Colo. 538, 31 Pac. 115.

#### REFERENCES.

Real estate acquired by executor or administrator for benefit of estate as realty or personalty.—See note 7 Am. & Eng. Ann. Cas. 703.

(20) Remainder in fee after homestead.—An order setting apart, as a homestead, a life estate in certain real property does not remove the remainder in fee in that property beyond the reach of creditors of the estate. The homestead estate is so removed and excluded because it has ceased to be subject to any of the purposes of administration. It is freed from the debts of the creditors. It is freed from the possession of the administrator; but it does not follow therefrom that the title in fee embraced in the remainder over to the heirs is likewise removed from administration, and there is nothing either in the statute or in the decisions to warrant such a construction.—*Estate of Tittel*, 139 Cal. 149, 150, 153, 72 Pac. 909.

#### 2. Inventory and appraisalment.

(1) In general.—When a question arises, in the administration of an estate, whether property shall be inventoried as a part of the estate or not, the probate court may hear evidence sufficient to determine whether the property in question belongs to the estate, or whether the estate has any interest therein, or has reasonable claim thereto, which claim may become an asset of the estate; not for the purpose of judicially determining the title of any property claimed by any third person, but to determine the good faith of the claim. The statute does not require property or money to be inventoried, unless it belongs to the estate, and the court will not require money to be inventoried which does not belong to the estate and is not an asset thereof.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 76. "The executor or administrator can be required to inventory only the property that belongs to the decedent, at the time of his death, in his own right, or to which the personal representative is entitled in his official capacity, as distinguished from the heir, legatee, widow, or donee mortis causa of the testator or intestate. The court has no power, therefore, to compel the administrator to inventory property not clearly belonging to the estate. On the other hand, the court should not reject an inventory exhibited because it contains property, the title of which is in dispute," as the court has no power to try the title of property between the personal representatives and a stranger.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 76, quoting from 2 *Woerner's Law of Administration*, 2d ed., sec. 317. The court has jurisdiction to determine prima facie whether

or not the property belongs to the estate and is an asset thereof. This adjudication is not binding upon any person afterwards claiming the property in another forum, but is only for the purpose of determining whether the administrator shall be forced to make an inventory thereof.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 77. The inventory is required to set forth all the estate which shall have come to the "knowledge," as well as that which shall have come to the possession, of the administrator, though he is to be charged in his account with only such portion of the estate as may come to his possession at the value of the appraisement.—*Estate of Simmons*, 43 Cal. 543, 549. A clause in the statute under which the administrator is required to file an inventory and appraisement within three months after his appointment is directory, and does not render them invalid when subsequently filed.—*Phelan v. Smith*, 100 Cal. 158, 169, 34 Pac. 667. The notice to creditors may be given before the inventory is filed.—*Paterson v. Schmidt*, 111 Cal. 457, 458, 44 Pac. 161. Although the executor or administrator may, upon notice, have his letters testamentary or of administration revoked by the court for his failure to file an inventory and appraisement within the time allowed by the statute, such statute is directory, rather than mandatory, and the court has a discretion in the matter of removal for such cause, which will not be interfered with on appeal, except in cases where a gross abuse of discretion has occurred.—*Estate of Graber*, 111 Cal. 432, 434, 44 Pac. 165. The duties as imposed by the statute upon executors and administrators can not affect the rights of creditors of the deceased, or change the mutual relations existing between such creditors and the estate.—*Ainsworth v. Bank of California*, 119 Cal. 470, 477, 63 Am. St. Rep. 135, 39 L. R. A. 686, 51 Pac. 952. The administrator can not, without being duly authorized by the probate court, assign a mortgage given to the deceased in his lifetime, as indemnity to him as surety, to the principal creditor. Such a mortgage must be listed in the inventory of appraisement as a credit in the hands of the administrator, to be applied as an offset against the debt caused by the instrument upon which the deceased was surety.—*Pierce v. Batten*, 3 Kan. App. 396, 42 Pac. 924. An administrator is required by statute to make a true inventory of the estate, and if he neglect or refuse to do so his letters may be revoked, and the court may take testimony as to the character of the property and the title thereto, not for the purpose of determining the title, which must be done in the appropriate manner provided by law, but for the purpose of determining whether the estate has a prima facie right to the property and whether the same should be included in the inventory.—*Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 194. A probate clerk who died in 1906, leaving partially completed work done in making transcripts from the old county records for a new county, is entitled to have his compensation fixed under the laws of 1899, and not those of 1907.—*Summers v. Commissioners*, 15 N. M. 376, 380, 110 Pac. 509. It is not improper for the

court to order property to be inventoried as community property, property which is claimed by the husband as his separate estate and to accept the husband's bond to cover the rents, issues, and profits.—*Buchser v. Buchser*, 72 Wash. 675, 131 Pac. 194. An administrator, having reason to believe the decedent to have had a partnership interest, should inventory this and, if necessary, sue for its recovery; if unwilling to do so, he should resign.—*Hadley v. Hadley*, 73 Or. 179, 144 Pac. 80. It is provided by statute, that whenever any property shall come to the knowledge or possession of the administrator, not included in the inventory, he shall cause the same to be inventoried and appraised as soon as practicable after he discovers it, and the making of such inventory may be enforced by attachment, after notice, and, it may be added, by revocation of the letters.—*Polk v. Martin*, 82 Wash. 226, 144 Pac. 42. A complaint to the court, that property belonging to a decedent's estate has not been inventoried and appraised, may be made by an heir, legatee, creditor, or any one interested in the estate, and it becomes the duty of the court, on such a complaint being made, to cite the person holding such property to appear and be examined touching the same.—*Polk v. Martin*, 82 Wash. 226, 144 Pac. 42.

(2) *Affidavit*.—The object of requiring an affidavit by the executor or administrator to accompany the inventory and appraisement is, apparently, not to give any validity to the inventory as such, but to furnish evidence that it contains all the property in the knowledge or possession of affiant, thus serving as a check on the administrator.—*Phelan v. Smith*, 100 Cal. 158, 168, 34 Pac. 667. An inventory may be said to be completed when the work of the appraisers has been concluded, and the instrument showing the result of their labor has been signed and delivered by them. The purpose of the statute in requiring an affidavit is to furnish an additional assurance that the inventory contains a full account of all the property of the estate known to the executor or administrator, and also to obtain his solemn admission that he is properly chargeable in his accounts with all the property that is described in the inventory; and while the court may, upon its own motion, or upon the application of any person interested in the estate, compel the executor or administrator to comply with the statute requiring him to make an affidavit, yet the failure of an executor or administrator to discharge this duty would not render the inventory, properly signed and delivered by the appraisers, of no effect as an inventory.—*Estate of Lux*, 100 Cal. 593, 601, 35 Pac. 341. The administrator should, as the law directs, sign and verify the inventory; but if, after neglecting to do so, he makes no motion nor attempt toward having it struck from the files, nor toward making or having made an inventory of his own approving, he acquiesces in the instrument filed and is estopped to deny its validity.—*United States F. & G. Co. v. Clutter (Okla.)*, 179 Pac. 754.

(3) *Return*.—An inventory is returned, within the meaning of the law, when it has been completed by the appraisers and presented to

the judge or court for information, and as a basis for some judicial action to be taken in the proceeding for the settlement of the estate to which it relates. Nor is the filing of the inventory with a clerk an indispensable requisite to its return. The filing of an inventory with the clerk of a proper court would certainly constitute its return, but while this is so, such filing is not an indispensable step which must be taken in order to effect the return of such a paper.—*Estate of Lux*, 100 Cal. 593, 600, 601, 35 Pac. 341. An executor who claims to own in his individual right certain promissory notes payable to his own order but found among the effects of the testator, should not be compelled to make an unqualified return of such securities as the property of the estate, but the probate court should order the question of title to be properly brought before a court having jurisdiction to try same, which the probate court has not.—*Hartwig v. Flynn*, 79 Kan. 595, 100 Pac. 642.

(4) **Must include what.**—The law treats a debt or demand due from the executor or administrator from the time it becomes due as so much money in his hands, and it requires him so to report it.—*Estate of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991; *Treweek v. Howard*, 105 Cal. 434, 446, 39 Pac. 20; *Estate of Miner*, 46 Cal. 564; *Estate of Thomas*, 140 Cal. 397, 73 Pac. 1059; but the sureties on his bond are not liable beyond the representative's ability to pay.—*Sanchez v. Forster*, 133 Cal. 614, 65 Pac. 1077; *Estate of Thomas*, 140 Cal. 397, 73 Pac. 1059; *Estate of Walker*, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991. The interest of a decedent in a partnership must be included in the inventory of his estate, and be appraised as other property.—*Painter v. Estate of Painter*, 68 Cal. 395, 396, 9 Pac. 450. The inventory must also state the interest of the estate in property of third persons.—*Mesmer v. Jenkins*, 61 Cal. 151, 154. The inventory should also include money transferred by the husband before his death to his wife in trust.—*Sprague v. Walton*, 145 Cal. 228, 236, 78 Pac. 645. A judgment in favor of the estate should be inventoried by the executor or administrator.—*In re Conser's Estate*, 40 Or. 138, 66 Pac. 607, 609. Where the administrator of the estate of his deceased wife has received a sum of money which he claims to have received from the sale of his own property, and another claims to be a creditor of the deceased wife, and that the money received by the administrator accrued from the sale of her property, and that he is entitled to have the money applied to the payment of his debt, the administrator should be compelled to make an inventory of such money received in his final account and settlement and may set up any claim he or any other person may have thereto.—*Gille v. Emmons*, 91 Kan. 462, 138 Pac. 608.

(5) **Second or further inventory.**—If the first inventory is in proper form, and the second involves no additions or changes, it is merely surplusage; but it may often occur, from the discovery of other property, the destruction or loss of a portion of the property, and from

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various other causes, that a second or further inventory or appraisal is desirable. In all cases, the court, under the powers conferred upon it, may doubtless inform itself, by means of a new or further inventory and appraisal, of the true condition of the estate.—*Phelan v. Smith*, 100 Cal. 158, 169, 34 Pac. 667. A note given by the administrator to the decedent and which the former disputes should not be inventoried as part of the estate, but some discreet person should be appointed to sue on the note and if successful the judgment could then be inventoried as part of the estate.—*Durst v. Haenni*, 23 Colo. App. 431, 130 Pac. 81.

(6) *As evidence of value.*—The valuation of the "inventory" is evidently not intended to be conclusive for any purpose.—*Estate of Hinckley*, 58 Cal. 457, 516; *McNabb v. Wixom*, 7 Nev. 163; *In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 76; *Estate of Fernandez*, 119 Cal. 579, 584, 51 Pac. 851; *In re Conser's Estate*, 40 Or. 138, 66 Pac. 607, 610. It is only prima facie evidence of the value of the estate.—*Wheeler v. Bolton*, 92 Cal. 159, 170, 28 Pac. 558; *Estate of Fernandez*, 119 Cal. 579, 584, 51 Pac. 851. The appraisers make a preliminary estimate for the information of the court, and if property not included in the original inventory is discovered, it is made the duty of the executor or administrator to cause the value of such property to be estimated by the appraisers.—*Estate of Hinckley*, 58 Cal. 457, 516; *In re Conser's Estate*, 40 Or. 138, 66 Pac. 607, 609. The inventory is prima facie evidence of the extent and nature of the estate which has come to the administrator's hands, but he may, in proper cases, show that through inadvertence, ignorance, or mistake, property has been put into it which did not in fact belong there.—*Pennington v. Newman*, 36 Okla. 594, 129 Pac. 693.

(7) *Appraisalment.*—An appraisalment must be made of property discovered subsequently to the filing of the inventory.—*Estate of Hinckley*, 58 Cal. 457, 516; *In re Conser's Estate*, 40 Or. 138, 66 Pac. 607, 609. The executor or administrator is chargeable, in his account, for the whole of the estate of the decedent which may come into his possession, at the value of the appraisalment contained in the inventory.—*Estate of Gianelli*, 146 Cal. 139, 79 Pac. 841, 842; but it is not negligent for him to fail to appraise mortgaged property where it would have been a useless expense, as where it would not, if sold, have brought the amount of the mortgage.—*Estate of Strong*, 125 Cal. 603, 606, 58 Pac. 183. If personal property has been disposed of by the executor or administrator in accordance with the expressed wish of the decedent, and without including such property in the inventory, though he does not make a supplemental inventory thereof on final settlement, the court may determine its value, without having it appraised as other property of the estate.—*Estate of Garrity*, 108 Cal. 463, 38 Pac. 628, 630, 41 Pac. 485. The fact of non-appraisalment of certain property of the estate does not affect the validity of the final account if all the property received, or which by reasonable diligence should have been

received, has been punctiliously accounted for.—*In re Conser's Estate*, 40 Or. 138, 66 Pac. 607, 609. Section 7729 of the Revised Codes of Montana applies whenever circumstances require an appraisement to be made; and one may be made as often as occasion may require.—*State v. District Court*, 41 Mont. 357, 365, 109 Pac. 438. The court or judge in fixing the time in the notice mentioned in the Montana statute, concerning the appraisement of estates of decedents, should give a reasonable opportunity to those interested to be heard, according to the analogies of the statute in fixing the time for appearance after publication of summons, or those providing for notice in other cases.—*State v. District Court*, 41 Mont. 357, 368, 109 Pac. 438.

(8) **No estoppel from filing inventory.**—The filing of an inventory by an executor, who represents, in his petition for letters testamentary, that certain property included therein belongs to the estate, is not estopped from afterwards claiming such property as his own.—*Anthony v. Chapman*, 65 Cal. 73, 76, 2 Pac. 889. So if outside lands are inventoried by an administratrix as of her deceased husband, which were in truth not his estate, but the property of the administratrix, such fact does not estop her from claiming the property as her own, where she made the inventory by mistake of law and in ignorance of her rights.—*Baker v. Brickell*, 87 Cal. 329, 342, 25 Pac. 489, 1067. It is quite possible for property to be erroneously included in an inventory by one acting under pure mistake of facts or in ignorance of legal rights. Such conditions in no way change the fact of the real ownership, and incidentally do not affect the right of possession attached to such ownership. Hence, where property included in the inventory of the estate is claimed by the administrator, who had possession before he became administrator, he is not estopped from disputing the title of his successor.—*In re Murphy's Estate*, 30 Wash. 9, 70 Pac. 109. And if the filing of an inventory is not conclusive against the claim of an administrator to property therein contained, certainly where the administrator comes into possession of property, and refuses to inventory it, upon the claim that it does not belong to the estate, but belongs to some third person or to himself, no estoppel as to the title can be pleaded, simply because the property was received in a representative capacity.—*In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74, 76.

(9) **Correction of inventory, how made.**—As a general rule an inventory may not be impeached by a collateral attack. The proper method of correcting it is by motion, after notice, in the court where the administration is pending.—*Pennington v. Newman*, 36 Okla. 594, 129 Pac. 693.

(10) **Same. Striking homestead therefrom.**—The right to occupy the homestead is given by statute and requires no order of court to vitalize it and to give it effect; and where the inventory of an estate, as filed by the administrator, has been erroneously made to include



the homestead, the county court has authority, under the constitution, to correct the instrument by striking out the homestead.—*Belt v. Bush* (Okla.), 176 Pac. 935. The petition to strike from the inventory of the assets of an estate the homestead of the decedent, and set it apart to the surviving spouse held to state facts sufficient to invoke the jurisdiction of the county court.—*Belt v. Bush* (Okla.), 176 Pac. 935, 936.

### 3. Possession of estate.

(1) *Right to, and nature of.*—Immediately upon the issuance of letters of administration to an executor or administrator, he is entitled to have the possession of the estate of deceased, both real and personal, to the end that the rents and profits, and if need be the proceeds of the property itself, be applied to the payment of debts and charges, and the balance, if any, distributed and by him delivered to the party entitled.—*Page v. Tucker*, 54 Cal. 121, 123; *Meeks v. Hahn*, 20 Cal. 620, 628; *Jahns v. Nolting*, 29 Cal. 507, 510; *Murphy v. Crouse*, 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; *Webb v. Winter*, 135 Cal. 455, 458, 67 Pac. 691; *In re Higgins' Estate*, 15 Mont. 474, 28 L. R. A. 116, 39 Pac. 506; *Bank of Ukiah v. Rice*, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020. An administrator is entitled to the possession of the property of the deceased, real and personal, for the purposes of administration.—*Butler v. Smith*, 20 Or. 126, 25 Pac. 381. He takes charge of the entire estate, whether it passes to the heir or is otherwise disposed of.—*Ward v. Moorey*, 1 Wash. Ter. 104. Not only is the executor or administrator entitled to the possession of all the real and personal estate of the decedent, but it is made his duty to reduce it into possession, and his right of action must be commensurate with the right and duties thus imposed upon him by the statute.—*Collins v. O'Laverty*, 136 Cal. 31, 34, 68 Pac. 327. The possession of the administrator does not divest the heir or devisee of the fee. His possession is for the heirs or devisees who are the owners and seised in fee, subject to the temporary right of the administrator to the possession, and subject to the defined statutory authority and powers of sale given to the administrator.—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 484, 58 Pac. 908. At common law, the administrator was entitled to the possession of the personal estate of the deceased until disposed of in due course of administration. The title vested in him, but here the title vests in the heir. At common law, the title vested in the administrator, by relation, at the time of the death of the deceased; but here the administrator's control of the property, by relation, extends back to the same point of time, and he is deemed in law from that time to have the possession, or to be entitled to the possession, of the personal property, as the case may require.—*Jahns v. Nolting*, 29 Cal. 507, 511. The right to the possession of the real property of an intestate remains exclusively with the administrator until the estate is settled, or until distribution is directed by order of the probate court.—*Meeks v. Hahn*, 20 Cal. 620, 628. And the court can not deprive an executor or admin-

istrator of his possession of the property of the estate, except in the manner provided by law.—*Estate of Welch*, 110 Cal. 605, 609, 42 Pac. 1089. An executor, however, has no right of possession as against a chattel mortgagee who has the right of possession under the terms of a contract. The death of the mortgagor does not affect the rights of the mortgagee under the contract, and the executor possesses no new rights to the property, or to the possession of it, that were not in the mortgagor in his lifetime. On default in payment, the mortgagee has the right of possession of the property, as well against the executor of the mortgagor as against the mortgagor himself.—*Mathew v. Mathew*, 138 Cal. 334, 337, 71 Pac. 344. An executor or administrator is not a co-tenant with a devisee or heir, and he is entitled to the possession against the devisee or heir.—*Webb v. Winter*, 135 Cal. 455, 458, 67 Pac. 691. Upon the death of one owning personal property, the property passes at once to his heirs, devisees, or legatees, but subject to the control of the probate court and the possession of the administrator or executor, for the purposes of administration; and the title of the heirs is subject to the performance by the executor or administrator of all his trusts, among which is the payment of the debts of the decedent; and the heirs finally come into the possession and enjoyment of only such portion as may remain after the execution of such trusts by the representative.—*Estate of Vance*, 152 Cal. 760, 93 Pac. 1010, 1011. Representative takes possession of entire estate for administration purposes and all property is subject to debts without priority between realty and personalty.—*Richards v. Blaisdell*, 12 Cal. App. 101, 106 Pac. 732. Except as otherwise provided by statute, an executor or administrator is entitled to the possession and control of all property of the deceased until the administration is completed, or such property has been surrendered to the heirs or devisees by order of the court or judge.—*Hillman v. Young*, 64 Or. 73, 79, 127 Pac. 793, 129 Pac. 124. The administrator is entitled to the possession and control of the real, as well as of the personal estate, of the decedent until the administration is completed.—*Stadelman v. Miner*, 83 Or. 348, 155 Pac. 708, 163 Pac. 585, 983. Executors and administrators are entitled to the possession and control of the property, both real and personal, of estates while being administered by them, as against heirs and devisees, as well as against all other persons.—*Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997. Until distribution, the administrator has the right of possession of real estate, to the exclusion of the heir.—*Estate of Piercy*; *Piercy v. Piercy*, 168 Cal. 750, 145 Pac. 88. Under the statutes of Wyoming the executor or administrator of an estate of a deceased person is entitled to the possession of all the real and personal property belonging to the estate, and to receive the rents and profits thereof, and may recover the rents and profits of land held in trust for the decedent.—*Cook v. Elmore*, 25 Wyo. 393, 402, 171 Pac. 261. The possession of an administrator who was holding the land for residuary devisees as well as administrator could not become adverse

as against the testator's daughter until the latter had notice that such residuary devisees were claiming to own the land absolutely.—*Christianson v. Talmage*, 69 Or. 440, 138 Pac. 452, 453. If a person contracts for the purchase of land, takes possession, makes valuable improvements of a permanent nature, and pays the full purchase price, the administrator of his estate is entitled to continue his possession as his personal representative.—*Zeuske v. Zeuske*, 62 Or. 46, 51, 124 Pac. 203. An administrator is not entitled to possession of the property as against a tenant by the curtesy. The right to the possession against him can not be adjudicated until he has had his day in court upon an issue tendered against him by the administrator. Quære whether the estate of the tenant by the curtesy is subject to the debts of the wife and therefore subject to possession by the representative of the estate.—*Haberly v. Treadgold*, 67 Or. 425, 136 Pac. 334, 335.

(2) Statute of limitations. Loss of right.—The statute of limitations runs against the executor's or administrator's right of possession. The right of possession resting in the representative is barred in the same way as the right of possession in any other trustee.—*Webb v. Winter*, 135 Cal. 455, 457, 67 Pac. 691. The executor or administrator ceases to be entitled as of course to the possession of the property of the estate, where it has been put into the hands of devisees or legatees under the provisions of the statute, upon their giving bonds for the payment of their proportion of the debts.—*Estate of Woodworth*, 31 Cal. 595, 619. Where the objection of the bar of statute of limitations does not appear upon the face of the complaint, and the objection is not raised by the answer, it is, for the purposes of the action, to be regarded as abandoned. Such is the rule where the action is upon a demand arising upon contract, and in our system of practice the same rule must apply where the action is to enforce a right to the possession of real property.—*Meeks v. Hahn*, 20 Cal. 620, 627. A right of action existing in decedent at his death must be brought within a year from the death by his administrator under section 2890, Comp. Laws of Utah of 1907.—*Rasmussen v. Sevier Valley Co.*, 40 Utah 371, 121 Pac. 745. Section 1452 of the Code of Civil Procedure of California does not make possession of land by the administrator a necessary prerequisite to a sale by him.—*Estate of Bazzuro*, 161 Cal. 72, 118 Pac. 434. Where a testator was insane at the time of the performance of certain transactions complained of and remained so until the time of his death the statute of limitations does not run against him, and his executors may have such transactions set aside.—*Fleming v. Black Warrior Copper Co. Amalgamated*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273. A judgment against the administrator, in an action brought by him against the heirs to obtain possession of the land, rendered in accordance with the provisions of section 1452 of the Code of Civil Procedure of California, upon findings that possession by him was unnecessary to pay debts, expenses, or legacies, or for distribution, did not divest the administrator or the court of the power to sell the land, if such

sale was for the best interests of the heirs.—Estate of Bazzuro, 161 Cal. 72, 118 Pac. 434.

(3) Domiciliary executors.—It is the duty of the domiciliary executor to take possession of foreign assets of his testator, so far as he is able to do so.—Estate of Ortiz, 86 Cal. 306, 316, 21 Am. St. Rep. 44, 24 Pac. 1034; and, where no conflicting grant of authority appears, the domiciliary appointee of another state may take charge of and control personal property of the deceased in the state of its situs.—Estate of Ortiz, 86 Cal. 306, 315, 21 Am. St. Rep. 44, 24 Pac. 1034.

(4) Recovery of possession.—Where the executor or administrator has the exclusive right to the possession of the property of the estate of a decedent until the final order of the court, and where he has the right to bring suit to recover any property belonging to the estate held adversely by others, and where the possession of the heirs is made subject to the possession of the executor or administrator for the purpose of administration, the executor or administrator has a right to maintain an action to recover the property of his intestate.—Jenkins v. Jensen, 24 Utah 108, 91 Am. St. Rep. 783, 66 Pac. 773, 776; Roury v. Duffield, 1 Ariz. 509. He may recover the possession from an heir or devisee.—Page v. Tucker, 54 Cal. 121, 122. And the executor or administrator, being entitled to the possession of the estate of the deceased, may maintain ejectment.—Curtis v. Herrick, 14 Cal. 117, 73 Am. Dec. 632; McClelland v. Dickenson, 2 Utah 100; but see Emeric v. Penniman, 26 Cal. 119; Carrhart v. Montana, etc., Co., 1 Mont. 245. He may also bring an action to quiet title to the real estate of his decedent.—Pennie v. Hildreth, 81 Cal. 127, 130, 22 Pac. 398; Collins v. O'Laverty, 136 Cal. 31, 68 Pac. 327. If a person, before his death, was entitled to a conveyance of land, a conveyance of it to his administrator, as such, vests the legal title thereto in the administrator.—In re Smith, 4 Nev. 254, 97 Am. Dec. 531. The executor or administrator may maintain an action necessary either to protect his possession or to reduce into possession property of the estate held by others. In the application of this rule, "the difference between legal and equitable estates is of no practical importance. They are both estates originating by law, and held under law, and in that sense are legal estates." There is therefore no room, in an action by the administrator of a deceased person to set aside and cancel a deed executed by the decedent in her lifetime, for any distinction between legal actions brought on the title, and equitable actions brought to recover property of which the legal title as well as the possession is in another. The sole test of the administrator's right of action is the right of the estate to the possession of the property. If the right exists, then the right of action exists; and it will make no difference if, in order to recover property, to the possession of which the estate is entitled, it should become necessary to cancel a voidable deed, or otherwise, according to the equity practice, to dispose of an outstanding legal title.—Collins v. O'Laverty, 136 Cal.

31, 35, 68 Pac. 327. In an action by an executor or administrator for the possession of real estate of his decedent, it is not necessary to set out the inventory and appraisement in the complaint, if the making of an inventory is not a prerequisite of the right to take possession of the estate.—*Black v. Story*, 7 Mont. 238, 14 Pac. 703. An executor or administrator, however, is not entitled to institute partition proceedings, unless expressly authorized by the statute.—*Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 484, 485, 58 Pac. 908. If the executor or administrator has a right to sue, and omits that duty, the beneficiary is then barred, and his remedy is against the administrator or his bondsmen. If the administrator fails to sue to recover land of the estate, or to set aside a sale within three years next following it,—the administration so long continuing,—then the heirs, as well as himself, are barred, even though the heirs are minors; and this on the ground that, under our system, the administrator represents the heirs; he the trustee, they the cestuils.—*Dennis v. Dint*, 122 Cal. 39, 44, 68 Am. St. Rep. 17, 54 Pac. 378. If an administrator negligently allows the statute of limitations to run so as to bar his rights as such, he lays himself liable to the heir or any one else by his failure to perform his duty.—*Jenkins v. Jensen*, 24 Utah 108, 91 Am. St. Rep. 783, 66 Pac. 773, 778. The possession of an administrator may be tacked to that of heirs to make out a five years' continuous adverse possession, because the possession of the administrator is that of the heir.—*Spotts v. Hanley*, 85 Cal. 155, 167, 24 Pac. 738. An executor or administrator is entitled to the possession of the real estate of his decedent, and may maintain an action therefor.—*In re Higgins' Estate*, 15 Mont. 474, 28 L. R. A. 116, 39 Pac. 506, 509.

#### REFERENCES.

Possession of personal assets.—See note 112 Am. St. Rep. 731. Administrator's right to possession of personal property of his decedent and to recover it.—See note 3 L. R. A. (N. S.) 704.

#### 4. Appeal.

(1) *In general*.—Although judgment was for the administrator and against the personal defendant, who claimed the legal right to the money, yet where the facts are undisputed, and the single question presented upon appeal is as to their legal effect, and as to whether the findings of the undisputed facts warrant the conclusions of law and support the judgment, it is held otherwise, and that judgment should be ordered for defendant upon the findings.—*Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261. Judgment in action by representative to recover land fraudulently transferred held erroneous in so far as it precluded defendants from retaining surplus after payment of debts, Code Civ. Proc., Sec. 1591, requiring payment of any surplus to person from whom property is recovered.—*Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34.

## CHAPTER II.

## EMBEZZLEMENT AND SURRENDER OF PROPERTY OF ESTATE.

- § 379. Embezzlement of estate before issuance of letters.
- § 380. Citation to persons suspected of having embezzled estate, etc.
- § 381. Form. Complaint charging concealment, embezzlement, etc., of estate.
- § 382. Form. Citation to answer for alleged embezzlement of estate, etc.
- § 383. Refusal to obey citation. Penalty.
- § 384. Form. Commitment for contempt.
- § 385. Citation to account for estate.

## EMBEZZLEMENT OF PROPERTY OF ESTATE.

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|--|------------------------------------|
| 1. Definition.                           | 2. Indictment. Petition. Evidence. |
| 2. Construction and validity of statute. | 4. Power of court.                 |

## § 379. Embezzlement of estate before issuance of letters.

If any person embezzles, conceals, smuggles, or fraudulently disposes of any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled, concealed, smuggled, or fraudulently disposed of, to be recovered for the benefit of the estate.—*Kerr's Cyc. Code Civ. Proc.*, § 1458.

## ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska—Compiled Laws of 1913, section 1646.
- Arizona—Revised Statutes of 1913, paragraph 861.
- Colorado—Mills's Statutes of 1912, section 8042.
- Idaho—Compiled Statutes of 1919, section 7560.
- Montana—Revised Codes of 1907, section 7504.
- Nevada—Revised Laws of 1912, section 5952.
- North Dakota—Compiled Laws of 1913, sections 8709, 8800.
- Oklahoma—Revised Laws of 1910, section 6324.
- Oregon—Lord's Oregon Laws, section 1190.
- South Dakota—Compiled Laws of 1913, section 5774.

Utah—Compiled Laws of 1907, section 3936.

Washington—Laws of 1917, chapter 156, page 670, section 101.

Wyoming—Compiled Statutes of 1910, section 5557.

**§ 380. Citation to persons suspected of having embezzled estate, etc.**

If any executor, administrator, or other person interested in the estate of a decedent, complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, or fraudulently disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent died, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent died, or where letters have been granted. But if he appears and is found innocent, his necessary expenses must be allowed him out of the estate.—*Kerr's Cyc. Code Civ. Proc.*, § 1459.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1642.

Arizona—Revised Statutes of 1913, paragraph 862.

Colorado—Mills's Statutes of 1912, section 8042.

Idaho—Compiled Statutes of 1919, section 7561.

Kansas—General Statutes of 1915, section 4683.

Montana\*—Revised Codes of 1907, section 7505.

Nevada—Revised Laws of 1912, section 5953.

North Dakota—Compiled Laws of 1913, sections 8712, 8800.

Oklahoma—Revised Laws of 1910, section 6325.

Oregon—Lord's Oregon Laws, section 1186.

South Dakota—Compiled Laws of 1913, section 5775.

Utah—Compiled Laws of 1907, section 3927.

Washington—Laws of 1917, chapter 156, page 670, section 102.

Wyoming—Compiled Statutes of 1910, section 5558.

**§ 381. Form. Complaint charging concealment, embezzlement, etc., of estate.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Now comes —, and, complaining to the court, alleges:

That he is the duly appointed, qualified, and acting administrator <sup>2</sup> of the estate of —, deceased;

That he suspects that — has concealed, smuggled, and conveyed away certain goods and chattels of the decedent, to wit, —; <sup>3</sup>

That he suspects that said — has in his possession, and has knowledge of, certain deeds, conveyances, bonds, contracts, and other writings, to wit, —, <sup>4</sup> which contain evidences of, and tend to disclose, the right, title, interest and claim of decedent to certain real and personal property, and in certain claims and demands; <sup>5</sup> and that the said — has knowledge of a lost will of said decedent. <sup>6</sup>

Complainant, furthermore, is informed and believes, and upon such information and belief alleges the fact to be, that said — has had in his possession certain personal property of said estate, to wit, —, <sup>7</sup> but that the said — neglects and refuses to deliver said property, or any part thereof, to said administrator, <sup>8</sup> but has fraudulently embezzled, converted, and appropriated the same to his own use.

Wherefore complainant prays that the said — be cited to appear before this court, that he may be examined on oath concerning the matters alleged in this complaint.

—, Attorney for Complainant. —, Complainant.

[Add ordinary verification.]

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, executor of the last will, etc. <sup>3</sup> Insert description thereof. <sup>4</sup> Give brief description. <sup>5</sup> State



them. <sup>6</sup> Give particulars, as far as possible. <sup>7</sup> Insert description.  
<sup>8</sup> Or, executor.

**§ 382. Form. Citation to answer for alleged embezzlement of estate, etc.**

[Title of court.]

[Title of proceeding.]

{ No. —. <sup>1</sup> Dept. No. —.  
 [Title of form.]

The People of the State of —.

To —, Greeting.

You are hereby cited to be and appear in the — court of the — county <sup>2</sup> of —, at the court-room of Department No. —, in —, <sup>3</sup> on —, <sup>4</sup> the — day of —, 19—, at — o'clock in the forenoon <sup>5</sup> of said day, then and there to show cause, if any you have, why you should not be examined concerning property of the above estate alleged to have been embezzled by you.<sup>6</sup>

By order of the — court, this — day of —, A. D. 19—.

Attest: —, Clerk.

[Seal]

By —, Deputy Clerk.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, city and county. <sup>3</sup> Give location of court-room. <sup>4</sup> Give day of week. <sup>5</sup> Or, afternoon. <sup>6</sup> Or, concealed, smuggled, or fraudulently disposed of by you; or, concerning your possession or knowledge of possession of certain deeds, bonds, contracts, or other writings which contain evidence of, or tend to disclose some right, title, or interest of the above decedent to, certain real or personal property; or, concerning an alleged lost will of the above decedent.

**§ 383. Refusal to obey citation. Penalty.**

If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law.

**COMPELLING DISCLOSURE BY COMMITMENT.**—If, upon such examination, it appears that he has concealed, embezzled,

smuggled, or fraudulently disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law.

INTERROGATORIES AND ANSWERS TO BE IN WRITING.—And all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. In addition to the examination of the party, witnesses may be produced and examined on either side.—*Kerr's Cyc. Code Civ. Proc.*, § 1460.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, sections 1643, 1644.

Arizona—Revised Statutes of 1913, paragraph 863.

Colorado—Mills's Statutes of 1912, section 8042.

Idaho—Compiled Statutes of 1919, section 7562.

Kansas—General Statutes of 1915, sections 4684-4686.

Montana—Revised Codes of 1907, section 7506.

Nevada—Revised Laws of 1912, section 5954.

North Dakota—Compiled Laws of 1913, sections 8713, 8800.

Oklahoma—Revised Laws of 1910, section 6326.

Oregon—Lord's Oregon Laws, sections 1187, 1188.

South Dakota—Compiled Laws of 1913, section 5776.

Utah—Compiled Laws of 1907, sections 3927, 3928.

Washington—Laws of 1917, chapter 156, page 670, section 102.

Wyoming—Compiled Statutes of 1910, section 5559.

#### § 384. Form. Commitment for contempt.

[Title of court.]

[Title of estate.]

{ No. ——.1 Dept. No. ——. }  
[Title of form.]

This court, after due and legal proceedings had, having made and entered its order on the — day of —, 19—, that — appear before this court to be examined

on oath concerning the matters alleged in a complaint filed herein on the — day of —, 19—, wherein the said — was charged with concealing and embezzling certain estate of decedent;<sup>2</sup> and it being shown to the court that due and legal notice of said order was given to the said —; that he has neglected and refused, and still neglects and refuses, to obey said order; and that it is in his power to obey it,—

It is ordered, adjudged, and decreed, That the said — be committed to the county jail of said county,<sup>3</sup> there to remain until said order is complied with, or until he is discharged according to law, and that the sheriff of said county<sup>4</sup> take charge of the said —, and him safely keep and imprison in accordance with the terms of this order.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 Or whatever the order may have been. 3, 4 Or, city and county.

#### § 385. Citation to account for estate.

The superior court, or a judge thereof, upon the complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section.—*Kerr's Cyc. Code Civ. Proc.*, § 1461.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1645.

Arizona\*—Revised Statutes of 1913, paragraph 864.

Idaho\*—Compiled Statutes of 1919, section 7563.

Kansas—General Statutes of 1915, sections 4503, 4635.

Montana\*—Revised Codes of 1907, section 7507.

Nevada—Revised Laws of 1912, section 5954.

North Dakota—Compiled Laws of 1913, section 8800.

Oklahoma\*—Revised Laws of 1910, section 6327.

Oregon—Lord's Oregon Laws, section 1189.

South Dakota\*—Compiled Laws of 1913, section 5777.

Washington—Laws of 1917, chapter 156, page 670, section 102.

Wyoming—Compiled Statutes of 1910, section 5560.

#### EMBEZZLEMENT OF PROPERTY OF ESTATE.

- |  |                                    |
|--|------------------------------------|
| 1. Definition.                           | 3. Indictment. Petition. Evidence. |
| 2. Construction and validity of statute. | 4. Power of court.                 |

1. Definition.—To embezzle the property of an estate is to appropriate fraudulently to one's own use and to conceal the effects of the estate, which such person has in his possession; and to alienate, signifies to transfer wrongfully such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. An action of the nature of an action of trover may be brought by the administrator without the aid of the statute, against any person who has embezzled or alienated the personal property of the estate, prior to the granting of administration. The statute does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages, in case the tortious conversion has been committed at a particular time when the property is peculiarly exposed to loss,—that is, the time intermediate the death of the deceased and the issuing of the letters of administration.—*Jahns v. Nolting*, 29 Cal. 507, 511.

#### REFERENCES.

See note § 646, post.

2. Construction and validity of statute.—The statutory proceedings whereby an executor or administrator may recover property of the estate of a decedent, alleged to have been embezzled by the defendant and converted to his own use, are remedial and not penal in their nature, and do not contravene any provisions of the state constitution.—*Levy v. Superior Court*, 105 Cal. 600, 606, 29 L. R. A. 811, 38 Pac. 965; dismissed for want of jurisdiction, 167 U. S. 175, 17 Sup. Ct. 769, 42 L. Ed. 126. The statute of Colorado, providing for the county court's citing to appear before it persons charged with having embezzled funds that are included in the estate of a decedent, is in two parts, the one inquisitorial, designed especially as an economical and efficient mode of discovering property of a decedent's estate; and the other for giving a cause of action when certain facts are found to exist.—*Vick Roy v. Morgan*, 62 Colo. 122, 160 Pac. 1030. The Colorado statute, relating to the citation before the county court of persons alleged to have

embezzled money from a decedent, can not be employed to enforce the payment of a debt or liability for the conversion of property of the estate, or to try controverted questions of the right to the property.—*Vick Roy v. Morgan*, 62 Colo. 122, 160 Pac. 1030.

3. *Indictment. Petition. Evidence.*—An indictment which charges that the defendant received into his hands, as administrator, the sum of seventeen hundred and ninety-four dollars, but in rendering his final account charged himself with only seventeen hundred dollars, does not, in the absence of all averments of other necessary inculpatory facts, charge the defendant with the crime of embezzlement.—*People v. Gale*, 77 Cal. 120, 19 Pac. 231. The petition of an administrator, under the statute of Montana, alleged that decedent, at the time of his death, was indebted to a designated bank; that, as security for such indebtedness, he had, in his lifetime, given certain mortgages and deeded certain real property to the bank; that the administrator had since paid all the indebtedness and had received a reconveyance of a part of said realty; but that the bank had refused to reconvey the same; and concluded as follows: "That the following-named persons have some knowledge relating to the title to these interests in the said properties, and said administrator asks that this court make an order citing the following-named persons to appear before said court at a time and place where they may be examined under oath, and that they be required to bring all title deeds, books, memorandums, and entries in books in relation to all matters alleged in said complaint," after which follow the names of the persons;—is fatally defective, in that it fails to allege that any of these persons has in his possession or has knowledge of any book, deed, conveyance, bond, contract, or other writing which contains evidence of, or tends to disclose the right, title, interest, or claim of the decedent to, any part of the real estate described therein. A subsequent allegation to this effect is necessary, in order to set the machinery of the court in operation; and the court erred in issuing a citation upon such insufficient petition.—*State v. District Court*, 35 Mont. 318, 89 Pac. 62, 63. Where the plaintiff in an action for the wrongful taking of the personal estate of a decedent has averred the facts entitling him to recover damages according to the measure as enhanced by the statute, and has claimed the same in his prayer for relief, they should be awarded to him accordingly, if the evidence sustains the allegations of the complaint; and if he fails to prove the allegations which bring the case within the statutory rule of damages, but sustains the issues upon the remaining allegations, the recovery should be as in ordinary actions for trover and conversion.—*Jahns v. Nolting*, 29 Cal. 507, 513. The decree of partial distribution was properly admitted in a prosecution for embezzlement of legacy by the executor, as the basis for the demand made on behalf of the complaining witness, refusal of which was an act of conversion of the legacy, notwithstanding the fact that it had not become final through

expiration of the period for appeal when offered and admitted in evidence.—*People v. Dates*, 29 Cal. App. 260, 264, 155 Pac. 112.

4. **Power of court.**—While the statute provides for a citation and examination of parties alleged to have in their possession property belonging to an estate, it does not declare that the court may, after such examination, when the title to the property is in dispute, order such effects to be delivered up to the executor or administrator, or deposited where the court may order. Thus the court has no power to order a person to deposit a sum of money, claimed to belong to the estate of a decedent, in a bank, subject to the order of the court, where such person claims a right to the money.—*Ex parte Casey*, 71 Cal. 269, 271, 12 Pac. 118. So where money was paid to an attorney at law, as a retainer and for services, by the one who employed him, the fact that the attorney failed to comply with his contract, or to perform the agreed services, does not authorize the court to commit him to prison for refusing to refund the money that had been paid to him, especially where the court acts without trial, and without giving the petitioner a right to a defense in the ordinary way. In making such an order the court exceeds its jurisdiction.—*Tomsky v. Superior Court*, 131 Cal. 620, 623, 63 Pac. 1020. The probate court has no jurisdiction over a contest for the proceeds of an insurance policy payable, by its terms, to the widow and minor children of the deceased. Such fund is not a part of the estate of the deceased.—*Heydenfeldt v. Jacobs*, 107 Cal. 373, 377, 40 Pac. 492. For other cases involving the same principle, see *Ex parte Hollis*, 59 Cal. 405; *Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 292, 55 Pac. 985. A person in possession of personal property, under a claim of ownership, can not be summarily deprived thereof by an order of court based on the affidavits of an adverse claimant, but he has the right to have his title determined in an appropriate action by the verdict of a jury or the findings of a court upon issues framed for that purpose.—*Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 292, 55 Pac. 985. Under sections 3632 and 3636 of the General Statutes of Kansas of 1909, the probate court has authority to examine for concealed or embezzled property belonging to an estate and enforce its return to the administrator or other proper custodian, and if the person so embezzling or concealing such property refuse to comply with the order to restore the same, he may be imprisoned as for contempt of court and when so imprisoned he will not be discharged by a writ of habeas corpus.—*Ex parte Moran*, 83 Kan. 615, 112 Pac. 94. The district court upon an appeal from the probate court, in proceedings under the Executor's Act of Kansas, found the defendant guilty of unlawfully taking away and withholding personal property of the estate from the administrator and adjudged that it be restored to his possession and that such restoration be compelled by attachment; but also ordered that in case there were sufficient other personal property of the estate to pay the indebtedness

and expenses of administration, the administrator should return the property (or the proceeds thereof) to the defendants. Held that the order for the return of the property was an unwarranted interference with the due course of administration and erroneous.—*Vaughan v. Brown*, 81 Kan. 1, 105 Pac. 30.

## CHAPTER III.

## DUTIES OF CORONER AND TREASURER.

§ 385.1 Duties of coroner as to property of deceased persons.

§ 385.2 Sale of property at public auction.

§ 385.3 Sale of personal property on coroner's application, to pay burial expenses.

§ 385.4 Money found on dead body.

§ 385.<sup>1</sup> Duties of coroner as to property of deceased persons.

The coroner must within thirty days after an inquest upon a dead body deliver to the legal representatives of the deceased any money or other property found upon the body. If within the said thirty days no such legal representative makes a demand upon the coroner for the said money or property found upon the body of the decedent, then, upon the expiration of the said thirty days, the coroner must deliver to the treasurer any money found upon the body of the deceased, together with the proceeds of the sale of the property found upon the body of the decedent, which sale shall be held in accordance with the provisions of section four thousand one hundred and forty six a of this code, and at the same time an affidavit with the treasurer showing:

1. The amount of money belonging to the estate of the deceased person which has come into his possession since his last statement.

2. The disposition made of such property.

3. If the coroner or any justice of the peace acting as coroner fails to deliver to the treasurer within forty days after any inquest upon a dead body all money, or proceeds from the sale of property found upon such body, unless claimed in the meantime by the public administrator or other legal representative of the decedent as required by this section, the district attorney must pro-



ceed against the coroner or justice of the peace acting as coroner to recover the same by civil action in the name of the county.—*Kerr's Cyc. Pol. Code*, § 4146.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, sections 2484, 2485.

Arizona—Revised Statutes of 1913, paragraph 2633.

Idaho—Compiled Statutes of 1919, section 3677.

Montana—Revised Codes of 1907, section 3068.

Nevada—Revised Laws of 1912, section 7553.

North Dakota—Compiled Laws of 1913, section 3420.

Oklahoma—Revised Laws of 1910, section 1687.

Oregon—Lord's Oregon Laws, sections 1846-1849.

Utah—Compiled Laws of 1907, section 1239.

Washington—Remington's 1915 Code, section 4025.

**§ 385.<sup>2</sup> Sale of property at public auction.**

If within thirty days after an inquest upon a dead body no legal representative of such decedent shall have demanded from the coroner or any justice of the peace acting as coroner the property found upon the person of the decedent, the coroner or justice of the peace acting as coroner shall sell such property at public auction upon reasonable public notice, and must immediately thereafter deliver the proceeds of such sale to the treasurer, who shall place the same to the credit of the county, in the same manner as prescribed in section four thousand one hundred and fifteen of this code.—*Kerr's Cyc. Pol. Code*, § 4146a.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 2485.

Nevada—Revised Laws of 1912, section 7554.

Oklahoma—Revised Laws of 1910, section 1687.

Washington—Remington's 1915 Code, section 4026.

**§ 385.<sup>3</sup> Sale of personal property, on coroner's application, to pay burial expenses.**

When an inquest is held by the coroner, and no other person takes charge of the body of deceased, he must

cause it to be decently interred; and he may, in order to decently inter the body of the deceased, apply to a judge of the superior court of his county for an order permitting the coroner to summarily sell any personal property belonging to the deceased, and to withdraw any money that the deceased may have on deposit with any bank and to collect any indebtedness or claim that may be owing or due the deceased. If upon such application it appears to the court, by competent evidence, that the total value of the estate of the deceased is less than seventy-five dollars, the judge shall make an order granting the application; and there shall be no administration upon the estate of the deceased unless additional estate be found or discovered. No notice of the application need be given and no fee shall be charged by the clerk of the court or coroner for the filing of said application, or for any duty or service of the clerk or coroner connected therewith. Upon the sale of the personal property of the deceased or the collection of any money, claim, or indebtedness by the coroner, he shall use the same for expenses of the funeral of the deceased.

The coroner shall file with the clerk of the court a statement showing the property of the deceased that came into his hands, the amount received from the sale of any personal property, and the disposition of the property of the deceased, and shall file with the clerk vouchers showing what disposition was made of the property; if there is not sufficient property belonging to the estate of the deceased to pay the necessary expenses of the burial, the expenses are a legal charge against the county.—*Kerr's Cyc. Pol. Code*, § 4144.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

North Dakota—Compiled Laws of 1913, section 3421.

Oklahoma—Revised Laws of 1910, section 1687.

Washington—Remington's 1915 Code, section 4026.

**§ 385.<sup>4</sup> Money found on dead body.**

The treasurer upon receiving from the coroner or justice of the peace acting as coroner money found on a dead body must place it to the credit of the county. All said moneys must be kept in a separate fund.—*Kerr's Cyc. Pol. Code*, § 4115.

**PART VI.**  
**SUPPORT OF FAMILY. EXEMPT PROPERTY,**  
**HOMESTEAD.**

**CHAPTER I.**

**SUPPORT OF FAMILY. EXEMPT PROPERTY.**

- § 386. Right to remain in possession of homestead, etc.
- § 387. Form. Order making provision for support of family until return of inventory.
- § 388. All property exempt from execution to be set apart for use of family.
- § 388.1 Notice and hearing of petition to set aside exempt property for use of family.
- § 389. Form. Petition for decree setting apart homestead for use of family.
- § 390. Form. Order setting apart recorded homestead of value less than five thousand dollars. Community property.
- § 391. Form. Order setting apart recorded homestead, of value less than five thousand dollars, selected by decedent out of his or her separate property.
- § 392. Form. Order setting apart recorded homestead, of value less than five thousand dollars, selected by the survivor only, out of decedent's separate property.
- § 393. Form. Order setting apart homestead where none was recorded.
- § 394. Form. Order setting apart property exempt.
- § 395. Form. Petition for order setting apart personal property for use of family and for family allowance.
- § 396. Form. Affidavit of posting notice of hearing of petition for family allowance.
- § 397. Form. Notice of hearing petition for family allowance.
- § 398. Form. Order for family allowance.
- § 399. Extra allowance may be made.
- § 400. Payment of allowance.
- § 401. Property set apart, how apportioned between widow and children.
- § 402. Administration of estates not exceeding fifteen hundred dollars in value.
- § 403. Form. Order that summary administration be had.
- § 404. Form. Notice to creditors. Summary administration.

- § 405. Form. Order to show cause why entire estate should not be assigned to widow and minor children.
- § 406. Form. Notice of application for order to set aside all of decedent's estate for the benefit of his family.
- § 407. Form. Notice of time and place of hearing application for setting aside entire estate for use and support of family.
- § 408. Form. Affidavit of posting of notice of petition for assignment of estate for use and support of family.
- § 409. Form. Order assigning entire estate for use and support of family of deceased.
- § 410. When all property other than homestead to go to children.

## FAMILY ALLOWANCE.

- |  |   |
|--|---|
| 1. In general. Exempt property.                                | (22) Order. Insolvent estates.                                      |
| (1) Widow's quarantine.  | (23) Order. Validity.   |
| (2) Exempt property. Generally.                                | (24) Order. Finality, conclusiveness.                               |
| (3) Same. Statutory right.                                     | (25) Paid without order of court.                                   |
| (4) Same. Loss of right and waiver.                            | (26) Contest of allowance. Collateral attack.                       |
| (5) Same. Widower's right to.                                  | (27) Vacating allowance. Fraud.                                     |
| (6) Same. Expenditure of allowance.                            | (28) Liens. Contracts to pay out.                                   |
| (7) Same. Homestead.   | (29) Further allowance.   |
| (8) Same. Right of surviving Indian spouse to homestead.       | (30) Motion for new trial.  |
| (9) Nature of right.   | (31) Appeal. Review.  |
| (10) Application or petition. "Family."                        | 2. Assignment of estate less in value than fifteen hundred dollars. |
| (11) Proof of right.   | (1) In general.   |
| (12) Notice not required.                                      | (2) Notice to creditors, and to show cause.                         |
| (13) Considerations in fixing.                                 | (3) What property may be set apart.                                 |
| (14) Objections. Exceptions.                                   | (4) Widow is not entitled to, when.                                 |
| (15) Fixing amount. When not excessive.                        | (5) Apportionment, and rights of children.                          |
| (16) Widow is entitled to, when.                               | (6) Liens, outstanding titles, etc.                                 |
| (17) To be made when.  | (7) Passing and vesting of estate.                                  |
| (18) Widow is not entitled to, when.                           | (8) Sale and mortgage of estate.                                    |
| (19) To children.  | (9) Appeal.   |
| (20) Order. In general.  | (10) Death pending appeal. Abatement.                               |
| (21) Order. Duration, modification, cessation, and suspension. |   |

## § 386. Right to remain in possession of homestead, etc.

When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent,

and are also entitled to a reasonable provision for their support, to be allowed by the superior court, or a judge thereof.—*Kerr's Cyc. Code Civ. Proc.*, § 1464.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1647.

Arizona\*—Revised Statutes of 1913, paragraph 865.

Colorado—Mills's Statutes of 1912, section 8012; as amended by Laws of 1915, chapter 173, page 496.

Hawaii—Revised Laws of 1915, section 2984.

Idaho\*—Compiled Statutes of 1919, section 7564.

Kansas—General Statutes of 1915, section 4533; as amended by Laws of 1917, chapter 186, page 235.

Montana—Revised Codes of 1907, section 7508.

Nevada—Revised Laws of 1912, section 5956.

North Dakota—Compiled Laws of 1913, section 8723.

Oklahoma—Revised Laws of 1910, section 6328.

Oregon—Lord's Oregon Laws, section 1233.

South Dakota—Compiled Laws of 1913, volume II, page 491, section 153.

Utah—Compiled Laws of 1907, section 3846.

Washington—Laws of 1917, chapter 156, page 671, section 104.

Wyoming—Compiled Statutes of 1910, section 5602.

§ 387. Form. Order making provision for support of family until return of inventory.

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

A petition for letters of administration <sup>2</sup> on the estate of —, deceased, having been filed in this court, from which it appears that said — died on or about the — day of —, 19—; that at the time of his death he was a resident of said county <sup>3</sup> and state, and that he left a widow and — minor children; and it being shown to the court that said widow and minor children have no means of support until such letters <sup>4</sup> are granted, and the return of the inventory of said estate, and that the sum of — dollars (\$—) would be a reasonable sum for such support,—

It is hereby ordered, That the sum of — dollars

(\$——) per month be appropriated out of said estate for the support of said family until the return of said inventory, and ——, the said administrator,<sup>5</sup> is hereby directed to pay the same monthly, on the —— day of each and every month, to ——, the widow of said deceased, until said inventory be returned, or until the further order of this court.

Dated ——, 19——. ——, Judge of the —— Court.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, letters testamentary. <sup>3</sup> Or, city and county. <sup>4</sup> Or, letters testamentary. <sup>5</sup> Or, executor.

**§ 388. All property exempt from execution to be set apart for use of family.**

Upon the return of the inventory, or at any subsequent time during the administration, the court may on petition therefor, set apart for the use of the surviving husband or wife, or, in the case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded; provided such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided in article two of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent.—*Kerr's Cyc. Code Civ. Proc.*, § 1465.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

**Alaska**—Compiled Laws of 1913, section 1648.

**Arizona**—Revised Statutes of 1913, paragraph 866.

**Colorado**—Mills's Statutes of 1912, sections 3381, 8012; and Laws of 1915, chapter 178, page 496, amending said section 8012.

**Hawaii**—Laws of 1917, Act 38, page 50; amending Revised Laws of 1915, section 2491.

**Idaho**—Compiled Statutes of 1919, section 7565.

**Kansas**—General Statutes of 1915, sections 4533, 4534, 4535; as amended by Laws of 1917, page 235.

**Montana**—Revised Codes of 1907, section 7509.

**Nevada**—Revised Laws of 1912, section 5957.

**North Dakota**—Compiled Laws of 1913, sections 8723, 8725.

**Oklahoma**—Revised Laws of 1910, sections 6328, 6330.

**Oregon**—Lord's Oregon Laws, section 1234.

**South Dakota**—Compiled Laws of 1913, section 5779.

**Utah**—Compiled Laws of 1907, section 3846.

**Wyoming**—Compiled Statutes of 1910, section 5606.

**§ 388.<sup>1</sup> Notice and hearing of petition to set aside exempt property for use of family.**

When the petition mentioned in the preceding section is filed the clerk of the court must set the petition for hearing by the court and give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the petitioner, the nature of the application, and the time at which the same will be heard.

**MAILING OF NOTICE, AND PROOF.**—Such notice must be given at least ten days before the hearing, and a copy thereof must be mailed at least ten days before the day appointed for the hearing to the executor or administrator, if he be not the petitioner, and to any person named as co-executor or co-administrator not petitioning, and upon the attorney of any person who has appeared or given notice of appearance (by an attorney) in the estate as heir, legatee, devisee, next of kin, or creditor, or as otherwise interested, addressed to them at their places of residence, or office, if known, and if not known, then to the county seat of the county where the proceedings are pending. Proof of such posting and mailing must be



made at the hearing.—*Kerr's Cyc. Code Civ. Proc.*, § 1465a.

**§ 389. Form. Petition for decree setting apart homestead for use of family.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

To the Honorable the — <sup>2</sup> Court of the County <sup>3</sup> of —, State of —.

The petition of —, the administrator <sup>4</sup> of the estate of —, deceased, respectfully shows:

That said deceased was a resident of the county <sup>5</sup> of — at the time of his death, and left estate in the said county <sup>6</sup> and state;

That letters of administration were issued to —, the said administrator,<sup>7</sup> on the — day of —, 19—, and that on the — day of —, 19—, said administrator <sup>8</sup> duly returned an inventory and appraisement of said estate to said — <sup>9</sup> court;

That a certain quantity of land in said inventory, and hereinafter particularly described, together with the dwelling-house thereon and its appurtenances, was selected from the community property of said spouses <sup>10</sup> by said deceased in his lifetime, and was duly declared and recorded as a homestead by declaration recorded in the office of the county recorder of the county of — on the — day of —, 19—, in volume — of declarations of homestead, at page —; that said declaration of homestead remained in full force and effect at the time of the death of deceased;<sup>11</sup>

That said premises do not exceed in value the sum of five thousand dollars (\$5,000), and were appraised, as appears by said inventory and appraisement, at the sum of — dollars (\$—) only;

That the family of said deceased consists of his widow, —, and three minor children, viz., —, —, and —;

and that said widow was the wife of deceased at the time said homestead was declared and recorded as aforesaid;

That the said quantity of land is situated in said county <sup>12</sup> of —, state of —, and is particularly described as follows, to wit: —. <sup>13</sup>

Wherefore your petitioner prays that the said homestead, consisting of said quantity of land, together with the dwelling-house thereon and its appurtenances, be set apart for the use of the family of said deceased. <sup>14</sup>

Dated —, 19—.

—, Petitioner.

—, Attorney for Petitioner. <sup>15</sup>

**Explanatory notes.**—1 Give file number. 2 Title of court. 3 Or, city and county. 4 Or, executor. 5, 6 Or, city and county. 7, 8 Or, executor. 9 Title of court. 10 Or, from the separate property of the deceased. 11 Or, if no homestead had ever been selected, designated, and recorded as required by law, during the life of said deceased, by either said deceased or his surviving spouse, that a certain quantity of land in said inventory, and hereinafter described, with the dwelling-house thereon and appurtenances, was occupied by deceased and his family as a homestead at the time of his death, and is still so occupied by the widow and children of said deceased, and is in every respect fit and proper to be so used and occupied. 12 Or, city and county. 13 Describe the land. 14 Or, be set apart to —, the widow of said deceased. 15 Give address.

**§ 390. Form. Order setting apart recorded homestead of value less than five thousand dollars. Community property.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The inventory and appraisement herein having been duly made and filed, and the following described real estate having been appraised therein at not exceeding five thousand dollars (\$5,000) in value, and having been duly selected and recorded as a homestead in the lifetime of said decedent, and being community property,—

Now, on motion of —, it is ordered by the court, That the same be set off to —, the surviving widow <sup>2</sup> of said decedent, as her property, subject to no other

liability of said decedent than such as exists or has been created by law.<sup>3</sup>

Said land is described as follows, to wit: —.<sup>4</sup>

Entered —, 19—.

—, County Clerk.

By —, Deputy.

Explanatory notes.—1 Give file number. 2 Or as the case may be. 3 Refer to particular provision. 4 Describe the land.

**§ 391. Form. Order setting apart recorded homestead, of value less than five thousand dollars, selected by decedent out of his or her separate property.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The inventory and appraisement herein having been duly made and filed, and the following described real estate having been appraised therein at not exceeding five thousand dollars (\$5,000) in value, and having been duly selected and recorded as a homestead by said decedent during his life, out of his separate property,—

Now, on motion of —, the administrator<sup>2</sup> of said deceased, it is ordered by the court, That the said premises be set off to —, the surviving widow<sup>3</sup> of said decedent, as her property, subject to no other liability of said decedent than such as may exist under provisions of law,<sup>4</sup> if any such liability there be.

Said land is described as follows, to wit: —.<sup>5</sup>

Entered —, 19—.

—, County Clerk.

By —, Deputy.<sup>6</sup>

Explanatory notes.—1 Give file number. 2 Or, executor. 3 Or as the case may be. 4 Refer to particular provision. 5 Description. 6 That orders need not be signed by the judge, see note § 77, ante. Compare *Weinrich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Estate of Fath*, 132 Cal. 609, 64 Pac. 995.

**§ 392. Form. Order setting apart recorded homestead, of value less than five thousand dollars, selected by the survivor only, out of decedent's separate property.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The inventory and appraisement herein having been duly made and filed in this court, and the following described real estate having been appraised therein at not exceeding five thousand dollars (\$5,000) in value, and having been duly selected and recorded as a homestead by the wife of said decedent during his life, out of his separate property, the said decedent not having joined in said selection,—

Now, on motion of —, it is ordered, That the same be set off for the period of — years <sup>2</sup> from this date to the family of said decedent, namely, —, his widow, and — and —, his minor children.

Said land is described as follows, to wit: —.<sup>3</sup>

Entered —, 19—.

—, County Clerk.

By —, Deputy.<sup>4</sup>

**Explanatory notes.**—1 Give file number. 2 The period may be limited to the life of the survivor. Estate of Schmidt, 94 Cal. 334, 336, 29 Pac. 714; Estate of Firth, 145 Cal. 236, 238, 78 Pac. 643. But in no case can it extend beyond the life of the person to whom the homestead is set apart: Hutchinson v. McNally, 85 Cal. 619, 621, 24 Pac. 1071. Compare Weinrich v. Hensley, 121 Cal. 647, 54 Pac. 254; Estate of Fath, 132 Cal. 609, 64 Pac. 995. 3 Insert description. 4 That orders need not be signed by the judge, see note § 77, ante.

**§ 393. Form. Order setting apart homestead where none was recorded.**

[Title of court.]

[Title of proceeding.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The inventory and appraisement herein having been duly made and filed, and it having been shown to the court that no homestead had been selected and recorded during the life of said decedent,—

On motion of —, it is ordered, That the real estate hereinafter described be, and it is hereby, selected, designated, and set apart by the court as a homestead for the use of —, the surviving spouse, and —, the minor child, of said decedent.

Said property is community property,<sup>2</sup> and is described as follows: —.<sup>3</sup> —, County Clerk.

Entered —, 19—.

By —, Deputy.<sup>4</sup>

Explanatory notes.—1 Give file number. 2 Or, is separate property of the decedent, and is hereby set apart as a homestead for the period of — years from this date. 3 Describe the land. 4 That orders need not be signed by the judge, see note § 77, ante.

**§ 394. Form. Order setting apart property exempt.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

It appearing to the court that said deceased left surviving him —, his widow,—

Now, on motion of said widow, it is ordered, That there be set apart, for the use of said widow, the wearing-apparel and household furniture of the deceased, which furniture is described as follows, to wit: —.<sup>2</sup>

Entered —, 19—.

—, County Clerk.

By —, Deputy.

Explanatory notes.—1 Give file number. 2 Describe the property.

**§ 395. Form. Petition for order setting apart personal property for use of family and for family allowance.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

To the Honorable the Judge of the —<sup>2</sup> Court of the County<sup>3</sup> of —, State of —.

The petition of —, administrator<sup>4</sup> of the estate of —, deceased, respectfully shows:

That on the — day of —, 19—, an inventory and appraisement of said estate was duly returned to said —<sup>5</sup> court;

That, as appears by said inventory and appraisement, said estate has been appraised at the sum of — dollars (\$—);

That the debts of said estate do not exceed, in all probability, the sum of — dollars (\$—), and that said estate is solvent;<sup>6</sup>

That your petitioner is advised and believes that the following personal property, belonging to said estate, and mentioned in said inventory and appraisement, is by law exempt from execution, to wit: —;<sup>7</sup>

That the amount of said personal property which is by law exempt from execution is insufficient for the support of the family of said deceased; that an allowance out of the said estate is necessary for the maintenance of the said family; and that the sum of — dollars (\$—) per month is a reasonable allowance, according to the circumstances of said family.

Wherefore your petitioner prays that all of the said personal property may be set apart for the use of the said family; and that an allowance of — dollars (\$—) per month be made for the maintenance of said family, out of said estate, during the progress of the settlement of said estate.

—, Petitioner.

Dated —, 19—.

**Explanatory notes.**—1 Give file number. 2 Title of court. 3 Or, city and county. 4 Or, executor. 5 Title of court. 6 Or, insolvent, as the case may be. 7 Describe it.

**§ 396. Form. Affidavit of posting notice of hearing of petition for family allowance.**

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

State of —, }  
County <sup>2</sup> of —, } ss.

—, deputy county clerk of said county,<sup>3</sup> being duly sworn, says that on the — day of —, 19—, he posted correct and true copies of the within notice in three of the

most public places in said county,<sup>4</sup> to wit: one of the said copies at the place at which the court is held,<sup>5</sup> one at —,<sup>6</sup> and one at —,<sup>7</sup> in said county.<sup>8</sup> —

Subscribed and sworn to before me this — day of —, 19—. —, Deputy County Clerk.

Explanatory notes.—1 Give file number. 2-4 Or, city and county. 5 Naming it. 6, 7 Other public places; as, the city hall, land-office, United States post-office, etc. 8 Or, city and county.

**§ 397. Form. Notice of hearing petition for family allowance.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

Notice is hereby given, That —, the administrator<sup>2</sup> of the estate of —, deceased, has filed herein his petition praying for an order of this court granting a family allowance out of the estate of said deceased, and that —,<sup>3</sup> the — day of —, 19—, at — o'clock in the forenoon<sup>4</sup> of said day, at the court-room of said court, at the court-house,<sup>5</sup> in said county,<sup>6</sup> has been fixed for the hearing of such petition, at which time and place any person interested in said estate may appear and file his exceptions in writing to the said petition and contest the same.

Dated this — day of —, 19—. —, Clerk.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Or, executor. 3 Day of week. 4 Or, afternoon. 5 Give location of court-house. 6 Or, city and county.

**§ 398. Form. Order for family allowance.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

It appearing to the satisfaction of the court that the exempt property set apart to the widow is insufficient for the support of the widow and children of the deceased,—

It is ordered, That there be allowed and paid to the said widow, for the maintenance of the family of said de-

ceased, the sum of — dollars (\$—) per month, beginning on the first day of —, 19—, and continuing until the further order of the court.

Entered —, 19—. —, County Clerk.  
By —, Deputy.<sup>2</sup>

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> That orders need not be signed by the judge, see note § 77, ante.

**§ 399. Extra allowance may be made.**

If the property set apart is insufficient for the support of the widow and children, or either, the court or a judge thereof must take such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration. —*Kerr's Cyc. Code Civ. Proc.*, § 1466.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Alaska—Compiled Laws of 1913, section 1649.  
Arizona\*—Revised Statutes of 1913, paragraph 867.  
Hawaii—Revised Laws of 1915, section 2491.  
Idaho\*—Compiled Statutes of 1919, section 7566.  
Montana\*—Revised Codes of 1907, section 7510.  
Nevada—Revised Laws of 1912, section 5958.  
North Dakota—Compiled Laws of 1913, section 8727.  
Oklahoma—Revised Laws of 1910, section 6331.  
Oregon—Lord's Oregon Laws, section 1235.  
South Dakota—Compiled Laws of 1913, section 5782.  
Utah—Compiled Laws of 1907, section 3846.  
Washington—Laws of 1917, chapter 156, page 672, section 106.  
Wyoming—Compiled Statutes of 1910, section 5603.

**§ 400. Payment of allowance.**

Any allowance made by the court or judge, in accordance with the provisions of this article, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or



judge, take effect from the death of the decedent.—  
*Kerr's Cyc. Code Civ. Proc.*, § 1467.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 868.

Hawaii—Revised Laws of 1915, section 2491.

Idaho\*—Compiled Statutes of 1919, section 7567.

Montana\*—Revised Codes of 1907, section 7511.

Nevada—Revised Laws of 1912, section 5959.

North Dakota\*—Compiled Laws of 1913, section 8728.

Oklahoma\*—Revised Laws of 1910, section 6332.

South Dakota\*—Compiled Laws of 1913, section 5783.

Utah—Compiled Laws of 1907, section 3846.

Washington—Laws of 1917, chapter 156, page 672, section 106.

Wyoming\*—Compiled Statutes of 1910, section 5604.

**§ 401. Property set apart, how apportioned between widow and children.**

When property, other than the homestead selected and recorded during the lifetime of the decedent, is set apart to the use of the family, in accordance with the provisions of this chapter, such property, if the decedent left a surviving spouse and no minor child, is the property of such spouse. If the decedent left also a minor child or children, the one-half of such property belongs to the surviving spouse, and the remainder to the child, or in equal shares to the children, if there are more than one. If there is no surviving spouse, the whole belongs to the minor child or children. If the property set apart is a homestead, selected from the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and, subject to such homestead right, the property remains subject to administration.—*Kerr's Cyc. Code Civ. Proc.*, § 1468.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 1648.

Arizona—Revised Statutes of 1913, paragraph 869.

Idaho—Compiled Statutes of 1919, section 7568.

Kansas—General Statutes of 1915, section 4534; as amended by Laws of 1917, chapter 186, page 235.

Montana—Revised Codes of 1907, section 7512.  
Nevada—Revised Laws of 1912, section 5960.  
Oklahoma—Revised Laws of 1910, section 6333.  
Oregon—Lord's Oregon Laws, section 1234.  
South Dakota—Compiled Laws of 1913, section 5784.  
Utah—Compiled Laws of 1907, section 3847.  
Washington—Laws of 1917, chapter 156, page 672, sections 104, 105.  
Wyoming—Compiled Statutes of 1901, section 5607.

**§ 402. Administration of estates not exceeding fifteen hundred dollars in value.**

If a deceased person leave a widow or minor child or minor children and upon the return of the inventory of the estate of such deceased person it shall appear to the court or a judge thereof by the verified petition of the personal representative of such deceased person or of his widow or of the guardian of his minor children or of any of them that the net value of the whole estate of said deceased over and above all liens or encumbrances of record at the date of the death of said deceased does not exceed the sum of one thousand five hundred dollars, the court, or a judge thereof, shall, by order, require all persons interested to appear on a day fixed to show cause why the whole of said estate should not be assigned for the use and support of the family of the deceased.

NOTICE AND HEARING.—Notice thereof shall be given and proceedings had in the same manner as provided in section one thousand four hundred sixty-five a of this code. If upon the hearing, the court finds that the net value of the estate over and above all liens or encumbrances of record at the date of the death of said deceased does not exceed the sum of one thousand five hundred dollars, it shall, by decree for that purpose; assign to the widow of the deceased, if there be a widow, or if there be no widow, then to the minor children of the deceased, if there be minor children, the whole of the estate, subject to whatever mortgages, liens, or encumbrances there may be upon said estate at the time of the death of

said deceased, after the payment of the expenses of the last illness of the deceased, funeral charges, and expenses of administration, and the title thereof shall vest absolutely in such widow, if there is a widow, or if there is no widow, in the minor children or child, subject to whatever mortgages, liens, or encumbrances there may be upon said estate at the time of the death of the deceased, and there must be no further proceedings in the administration, unless further estate be discovered.—*Kerr's Cyc. Code Civ. Proc.*, § 1469.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 1650.

Arizona—Revised Statutes of 1913, paragraph 870.

Hawaii—Laws of 1917, Act 91, page 128, adding to Revised Laws of 1915 provisions concerning the administration of small estates, namely, sections 2506a-2506g.

Idaho—Compiled Statutes of 1919, section 7569.

Kansas—General Statutes of 1915, section 4660.

Montana—Revised Codes of 1907, section 7513; and Laws of 1909, chapter 134, page 200. See Supp. of 1915, pages 478, 479, sections 3092c-3092h.

Nevada—Revised Laws of 1912, sections 5961, 6127.

Oklahoma—Revised Laws of 1910, section 6334.

Oregon—Lord's Oregon Laws, section 1236.

South Dakota—Compiled Laws of 1913, section 5785.

Utah—Compiled Laws of 1907, section 3347.

Washington—Laws of 1917, chapter 156, page 666 (settlement of estates without administration).

Wyoming—Compiled Statutes of 1910, section 5608.

#### § 403. Form. Order that summary administration be had.

[Title of court.]

[Title of estate.]

{ No. —.1 Dept. No. —.  
[Title of form.]

It appearing to the court, upon the return of the inventory and appraisal of the estate of —, deceased, herein filed on this day, that the value of all of said estate does not exceed the sum of five hundred dollars (\$500); and that the said deceased left surviving him a widow and — minor children,—

It is ordered, That a summary administration of said estate be had, and that the administrator <sup>2</sup> of said estate make final settlement thereof at the end of six months from the date of this order. —, Judge.<sup>3</sup>

Dated —, 19—.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, executor. <sup>3</sup> Form appropriate in Montana.

**§ 404. Form. Notice to creditors. Summary administration.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Notice is hereby given, That the above-entitled court has ordered a summary administration of the estate of —, deceased, a copy of which order is as follows, to wit, —; that letters of administration <sup>2</sup> on said estate were granted to — on the — day of —, 19—, and bear said date; and that in pursuance of said order I will make final settlement of said estate on the — day of —, 19—.

Notice is further given to the creditors of, and to all persons having claims against, said estate to exhibit their claims, for allowance, to the said administrator,<sup>3</sup> at —, on or before the said — day of —, 19—; and that all claims not so exhibited will be forever barred.

Dated —, 19—.

—, Administrator <sup>4</sup> of the Estate of —, Deceased.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, letters testamentary. <sup>3, 4</sup> Or, executor.

**§ 405. Form. Order to show cause why entire estate should not be assigned to widow and minor children.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

The inventory and appraisement of the estate of said deceased having been returned and filed in this court, and

it appearing therefrom that the value of all of said estate does not exceed fifteen hundred dollars (\$1,500),—

It is ordered, That all persons interested in the estate of —, deceased, appear in department — of the —<sup>2</sup> court of the county<sup>3</sup> of —, state of —, on —,<sup>4</sup> the — day of —, 19—, at — o'clock in the forenoon<sup>5</sup> of said day, then and there to show cause, if any they have, why all of the estate of said deceased should not be • assigned for the use and support of —,<sup>6</sup> the —<sup>7</sup> of said deceased.

Let the clerk give notice of said hearing by posting notices thereof in three public places in this county,<sup>8</sup> at least ten days<sup>9</sup> prior to said day of hearing.

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Title of court. <sup>3</sup> Or, city and county. <sup>4</sup> Day of week. <sup>5</sup> Or, afternoon. <sup>6</sup> Insert names. <sup>7</sup> Widow and minor children. <sup>8</sup> Or, city and county. <sup>9</sup> Or other time fixed by the court.

**§ 406. Form. Notice of application for order to set aside all of decedent's estate for the benefit of his family.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Notice is hereby given, That —, administrator<sup>2</sup> of the estate of —, deceased, will, on the — day of —, 19—, apply to the above-entitled court, at the hour of — o'clock in the forenoon<sup>3</sup> of said day, for an order to set aside all of the estate of —, deceased, for the benefit of decedent's family.

—, Clerk of the — Court.

Dated —, 19—.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, executor; or, —, the widow of said deceased. <sup>3</sup> Or, afternoon.

**§ 407. Form. Notice of time and place of hearing application for setting aside entire estate for use and support of family.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

Notice is hereby given, That —, <sup>2</sup> the — day of —, 19—, at — o'clock in the forenoon <sup>3</sup> of said day, and the court-room of department — of the — <sup>4</sup> court, in the court-house <sup>5</sup> in the county <sup>6</sup> of —, state of —, have been fixed as the time and place when and where all persons interested in the estate of —, deceased, may appear and show cause, if any they have, why the entire estate of said deceased should not be assigned for the use and support of the family of said deceased.

—, Clerk.

Dated —, 19—.

By —, Deputy Clerk.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Day of week. <sup>3</sup> Or, afternoon. <sup>4</sup> Title of court. <sup>5</sup> State location of court-house. <sup>6</sup> Or, city and county.

**§ 408. Form. Affidavit of posting of notice of petition for assignment of estate for use and support of family.**

[Title of court.]

[Title of estate.]

{ No. —. Dept. No. —.  
[Title of form.]

State of —,  
County <sup>1</sup> of —, } ss.

—, deputy county clerk of said county, <sup>2</sup> being duly sworn, says that on the — day of —, 19—, he posted correct and true copies of the within notice in three of the most public places in said county, <sup>3</sup> to wit: one of said copies at the place at which the court is held, <sup>4</sup> one at —, <sup>5</sup> and one at —, <sup>6</sup> in said county. <sup>7</sup>

Subscribed and sworn to before me this — day of —, 19—. —, Deputy County Clerk.

**Explanatory notes.**—<sup>1-3</sup> Or, City and County. <sup>4-6</sup> Name the public places; as, the city hall, land-office, United States post-office, or as the case may be. <sup>7</sup> Or, city and county.

**§ 409. Form. Order assigning entire estate for use and support of family of deceased.**

[Title of court.]

[Title of estate.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

It appearing to the satisfaction of the court that notice of the order requiring all persons interested in said estate to appear on the — day of —, 19—, to show cause why all of said estate should not be assigned for the use and support of the family of said deceased, has been duly given as required by law and by the order of the court;<sup>2</sup> and upon hearing the court finds that the value of the entire estate of said deceased does not exceed the sum of fifteen hundred dollars (\$1,500), and that the expenses of the last illness of said deceased, funeral charges, and expenses of administration have been paid,—

It is therefore ordered, adjudged, and decreed, That the entire estate of said —, deceased, be, and the same is hereby, assigned to, and that the title thereof shall vest absolutely in, —, the widow <sup>3</sup> of said deceased, subject to whatever mortgages, liens, or encumbrances there may have been thereon at the time of the death of said deceased.

The said property consists of the personal property described in the inventory.<sup>4</sup> —, County Clerk.

Entered —, 19—.

By —, Deputy.<sup>5</sup>

**Explanatory notes.**—1 Give file number. 2 If the matter has been continued, say, "that the hearing thereof has been regularly continued by the court to this day. 3 Or, the widow, if any, and —, the minor child or children of said deceased. 4 And, if any, the following described real estate, giving its description. 5 See note § 77, ante, showing that orders need not be signed by the judge.

**§ 410. When all property other than homestead to go to children.**

If the widow has a maintenance derived from her own property equal to the portion set apart to her by the pre-

ceding sections of this article, the whole property so set apart, other than the homestead, must go to the minor children.—*Kerr's Cyc. Code Civ. Proc.*, § 1470.

#### ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona—Revised Statutes of 1913, paragraph 871.

Idaho—Compiled Statutes of 1919, section 7570.

Montana\*—Revised Codes of 1907, section 7514.

Nevada—Revised Laws of 1912, section 5962.

Oklahoma\*—Revised Laws of 1910, section 6335.

South Dakota\*—Compiled Laws of 1913, section 5786.

Utah—Compiled Laws of 1907, section 3847.

Wyoming\*—Compiled Statutes of 1910, section 5609.

#### FAMILY ALLOWANCE.

- |  |   |
|--|---|
| 1. In general. Exempt property.                                | (22) Order. Insolvent estates.                                      |
| (1) Widow's quarantine.  | (23) Order. Validity.   |
| (2) Exempt property. Generally.                                | (24) Order. Finality, conclusiveness.                               |
| (3) Same. Statutory right.                                     | (25) Paid without order of court.                                   |
| (4) Same. Loss of right and waiver.                            | (26) Contest of allowance. Collateral attack.                       |
| (5) Same. Widower's right to.                                  | (27) Vacating allowance. Fraud.                                     |
| (6) Same. Expenditure of allowance.                            | (28) Liens. Contracts to pay out.                                   |
| (7) Same. Homestead.   | (29) Further allowance.   |
| (8) Same. Right of surviving Indian spouse to homestead.       | (30) Motion for new trial.  |
| (9) Nature of right.   | (31) Appeal. Review.  |
| (10) Application or petition. "Family."                        | 2. Assignment of estate less in value than fifteen hundred dollars. |
| (11) Proof of right.   | (1) In general.   |
| (12) Notice not required.                                      | (2) Notice to creditors, and to show cause.                         |
| (13) Considerations in fixing.                                 | (3) What property may be set apart.                                 |
| (14) Objections. Exceptions.                                   | (4) Widow is not entitled to, when.                                 |
| (15) Fixing amount. When not excessive.                        | (5) Apportionment, and rights of children.                          |
| (16) Widow is entitled to, when.                               | (6) Liens, outstanding titles, etc.                                 |
| (17) To be made when.  | (7) Passing and vesting of estate.                                  |
| (18) Widow is not entitled to, when.                           | (8) Sale and mortgage of estate.                                    |
| (19) To children.  | (9) Appeal.   |
| (20) Order. In general.  | (10) Death pending appeal. Abatement.                               |
| (21) Order. Duration, modification, cessation, and suspension. |   |

#### 1. In general. Exempt property.

- (1) Widow's quarantine.—Whatever may be the widow's remedy to enforce her statutory right of remaining in her husband's house for one year after his death without being chargeable with rent there-



for, such right is not enforceable in an action of forcible entry and detainer.—*Aiken v. Aiken*, 12 Or. 203, 6 Pac. 682, 683. If she gives away personal property of the deceased between the time of his death and the issuance of letters of administration, such gift does not confer upon the donee either title to or the right of possession of such property as against the administrator.—*Jahns v. Nolting*, 29 Cal. 507, 514.

(2) **Exempt property. Generally.**—The court has power to set apart for the use of the widow of decedent the farming utensils and implements of husbandry used by the decedent in the operation of his farm, as property exempt from execution; and it may set off such exempt property to her without reference to any question as to the sufficiency of funds in the estate with which the widow may be supported.—*Estate of Slade*, 122 Cal. 434, 55 Pac. 158. But a grain-drill, not used nor kept by decedent during his lifetime for the purpose of carrying on his trade or business of keeping a city hotel, is not exempt for the use of his widow and minor children, as it was not exempt to the decedent at the time of his death.—*Reed v. Cooper*, 30 Kan. 574, 1 Pac. 822. Exemptions are the creatures of statutes, and exceptions to the general rule. No property is exempt, unless made so by express provision of law. Hence life-insurance policies, the annual premiums of which exceed five hundred dollars, can not, as to any portion thereof, be set apart to the widow and minor children as property exempt from execution.—*Estate of Brown*, 123 Cal. 399, 401, 402, 69 Am. St. Rep. 74, 55 Pac. 1055. But where money received by an administrator for a policy of insurance upon the life of a decedent is an asset of the estate, and the annual premiums do not exceed five hundred dollars, the money is exempt from execution, and is properly set apart to decedent's widow.—*Estate of Miller*, 121 Cal. 353, 355, 53 Pac. 906; *Holmes v. Marshall*, 145 Cal. 777, 781, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67, 79 Pac. 534. After the proceeds of a policy of insurance have been set apart to a widow as being property exempt from execution, the money is exempt from execution in her hands. It is exempt from execution as to all strangers or parties who have no claim to it without any provisions of the statute. It was intended to exempt it from the debts of the parties to whom it was payable, and who procured title to it by the death of the insured. It was not the intention that the insured might die leaving a small insurance and a dependent family, and that the insurance-money should be subject to execution for the debts of the wife, even if she is the beneficiary named in the policy.—*Holmes v. Marshall*, 145 Cal. 777, 779, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67, 79 Pac. 534. A policy of insurance belongs to the estate of the decedent, although it was made payable to his administrator.—*Estate of Miller*, 121 Cal. 353, 354, 53 Pac. 906. Where the decedent left a widow, but no minor child, property set apart by the probate court for the use of the family becomes the absolute property of such surviving widow.—*Fore v. Fore's Estate*, 2 N. D. 260, 50 N. W. 712.

While it is the duty of the probate court to set apart, for the use of the family of the decedent, personal property, in addition to specific articles mentioned in the statute, not to exceed in value the sum of fifteen hundred dollars, the property so set apart does not belong to the assets of the estate to be distributed to the heirs of the decedent. *Fore v. Fore's Estate*, 2 N. D. 260, 50 N. W. 712. The court could not, at common law, direct the payment of money of an estate for the support and education of decedent's children, to the exclusion of the creditor's or heirs at law.—*Estate of McSwain*, 176 Cal. 280, 168 Pac. 117, 119. The law whereby exempt property of the decedent is distributed to the surviving wife or husband, or the minor children, was intended to benefit heads of families; it is not available to non-resident heads of families.—*In re James' Estate*, *Bigelow v. Booth*, 38 S. D. 107, 113, 160 N. W. 525. The exempt personal property of a decedent which a widow is allowed to keep absolutely for the use of herself and children, is not, so long as the widow needs it, subject to partition at the suit of adult children living apart from her.—*Spencer v. Barker*, 96 Kan. 360, 366, 149 Pac. 736. It is the exempt property that is allowed and set apart to the surviving wife or husband or minor child, or children.—*In re James' Estate*, *Bigelow v. Booth*, 38 S. D. 107, 160 N. W. 525.

(3) *Same. Statutory right.*—The power of the court to direct the payment of money out of the estate of a deceased person for the support and education of his family to the exclusion of his creditors or heirs at law comes entirely from statute and did not exist at common law.—*In re McSwain's Estate*, *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 119,

(4) *Same. Loss of right and waiver.*—The right to be allowed the exempt property of a head of a family, which right, on the latter's death, accrues to the surviving husband, or wife, is not lost by not being asserted during the lifetime of such survivor.—*In re James' Estate*, *Bigelow v. Booth*, 38 S. D. 107, 160 N. W. 525. The right to be allowed the exempt property of a head of a family, which right, on the latter's death, accrues to the surviving husband or wife, is susceptible of being waived; but no waiver arises as the result of mere delay in asserting the right.—*In re James' Estate*, *Bigelow v. Booth*, 38 S. D. 107, 160 N. W. 525. One law exempts from execution money arising from life insurance, and another declares that, on return of the inventory, in the settlement of estates of decedents, the court may, on petition, set apart, for the use of the minor children, all property exempt from execution; but these laws are not compulsory upon persons concerned, and merely provide for them privileges in these respects which they may waive.—*Estate of Pillsbury*, 175 Cal. 454, 166 Pac. 11. The widow's allowance is a claim against the estate for support pending administration and is no more waived by a provision contained in an ante-nuptial agreement than any other just

claim against the estate would be.—*Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 70. The right to a widow's allowance under section 7223, Rev. Stat. is a right that can not be waived by presumption, assumption, of construction, and if it may be waived at all, it must be in terms that do not admit of doubt.—*Deeble v. Alerton*, 58 Colo. 166, 170, Ann. Cas. 1916C. 863, 143 Pac. 1096.

(5) *Same. Widower's right to.*—Under the statutes, the court may order an allowance to be made to a widow out of the estate of her deceased husband, and exempt property of his to be set aside to her; but there is no similar statute for the benefit of a widower, where the estate of his deceased wife is concerned.—*In re Bowen's Estate, Kilmer v. Bowen*, 95 Wash. 82, 163 Pac. 379. A man, surviving his wife is not entitled to a family allowance out of her estate, if she left no children.—*In re Bowen's Estate, Kilmer v. Bowen*, 95 Wash. 82, 163 Pac. 379. Where a wife died, having surviving her, a husband, the latter is not entitled to her exempt property unless she was head of the family and a resident of the state at the time of her death.—*In re James' Estate, Bigelow v. Booth*, 38 S. D. 107, 115, 160 N. W. 525.

(6) *Same. Expenditure of allowances.*—The mother is the proper person as head of the family to receive and supervise the expenditure of the family allowance, under all circumstances.—*In re McSwain's Estate, McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 119.

(7) *Same. Homestead.*—Upon the return of the inventory, or at any time thereafter during the administration, the court may (but this means "must"), on its own motion or on petition, set apart for the use of the family all the property exempt from execution and the homestead, if one has been selected and recorded. If no homestead has been selected and recorded, etc., the court must select, designate, set apart, and cause to be recorded, a homestead for the surviving husband or wife and the minor children; and if there be no husband or wife, then for the use of the minor children. If the amount thus set apart be insufficient for the support of the family, then, and then only, the court is required to make such reasonable allowance out of the estate as shall be necessary. But it was not the legislative intent to make the subsequent allowance which might become necessary a charge or lien upon the exempt or homestead property which the court is required to set apart to the family. This should, in regular order, be set apart at once upon the coming in of the inventory showing its existence; but if not then done, it may be done at any subsequent time during administration. A family allowance subsequently allowed can not impair the right of the surviving husband or wife and children to a homestead. A family allowance made before exempt property and the homestead are set apart, by parity of reasoning, is made subject to the right of the designated beneficiary to have a homestead and the exempt property set apart

for their benefit.—*Estate of Still*, 117 Cal. 509, 516, 49 Pac. 463. The wife and the minor child of deceased are entitled to have set apart to them, as their absolute property, a homestead, if petitioned for, and all exempt personal property of the estate. The statute is mandatory, and was evidently intended to secure and preserve the home for the benefit of the family, where they may live and be protected against creditors and heirs.—*In re Syndergaard's Estate*, 31 Utah 490, 88 Pac. 616, 617; and see *Dooly v. Stringham*, 4 Utah 107, 7 Pac. 405. Whether the homestead be set apart or not, the court has power, in its discretion, to make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate. The circumstances and condition of the family, as well as those of the estate, may be such that the court would more wisely exercise its discretion in making a pecuniary allowance for the support of the family out of the estate than setting apart to it a homestead; and if the widow is content with such allowance, without having a homestead set apart to her, it would seem that the other heirs ought not to complain. A homestead is primarily a place of abode for the family, and it might be, that, although, if one were set apart, they would thus be furnished with an abiding-place, they would not receive a sufficient income for their support, and the expense of maintaining the homestead would be disproportionate to their necessities; while, on the other hand, the widow might be better cared for by receiving an allowance sufficient for her support and residing elsewhere than upon a portion of the property of the estate.—*Estate of Garrity*, 108 Cal. 463, 467, 38 Pac. 628, 41 Pac. 485. The surviving widow or minor children are entitled to a homestead estate, to the extent prescribed by the statute, in the property owned and occupied by the decedent, at the time of his death, as a family home, although the homestead exceeds in value the statutory limits of the homestead exemption.—*Calmer v. Calmer*, 15 N. D. 120, 106 N. W. 684. In determining the value of the homestead for the purpose of ascertaining and selecting therefrom the homestead exemption or estate, the amount of existing mortgages or liens thereon can not be deducted from the value of the property.—*Calmer v. Calmer*, 15 N. D. 120, 106 N. W. 684. When a party dies seised in fee of land occupied and used by himself and family as a homestead at the time of his death, his surviving widow is entitled, as against his heirs or devisees, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintaining her home thereon, and the fact of her second marriage does not impair this right.—*Fore v. Fore's Estate*, 2 N. D. 260, 50 N. W. 712. Where the homestead is indivisible, without material injury, the surviving husband or wife, or minor children, as the case may be, are entitled, as against the heirs or devisees, to hold the entire premises as a homestead estate, even though the property exceeds five thousand dollars in value.—*Calmer v. Calmer*,

15 N. D. 120, 106 N. W. 684. The homestead laws were made for the protection of widows, without regard to whether they have or do not have children, and the widow, the property once having become a homestead, does not lose her interest in it by reason of the children, if any, having grown up, or for the reason that she does not happen to have any.—*Healy v. Bismark Bank*, 30 N. D. 628, 637, 153 N. W. 392. The Code of Civil Procedure of California, where it provides for setting apart, prior to distribution, exempt property, including a homestead, to the decedent's husband or wife or, if neither survives, to the minor children, and where it provides for making a reasonable allowance for the support of the widow and minor children, has reference, in both cases, to persons strictly within the family, although "family" is expressly mentioned only in the latter connection.—*Estate of McSwain*, 176 Cal. 280, 168 Pac. 117. Exempt homestead property may be set apart to the widow for the support of herself and minor children; when this is done, the property "is her property," and she takes a fee-simple estate therein capable of alienation as well as of possession and enjoyment.—*Wycoff v. Snapp*, 72 Or. 234, 237, 143 Pac. 902. The right to a homestead accrues to "a widow," as such, when there are no minor children.—*Clark v. Baker*, 76 Wash. 110, 118, 135 Pac. 1025. A widow, occupying and dwelling on land which at her husband's death was community property, and who, under the will took—so far as concerned what was his community portion—a trust coupled with an interest, may, after the satisfaction of the trust, declare a homestead on her portion in favor of herself and her second husband.—*Furman v. Brewer* (Cal. App.), 177 Pac. 495. The law of 1917, relating to homesteads and the awarding of property in lieu thereof to the widow of a decedent, like the general laws exempting homesteads and certain personal property, rests in a sound public policy and contemplates the prevention of dependency even as against the rights of creditors.—*In re Lavenberg's Estate*, 104 Wash. 515, 177 Pac. 328. A wife surviving her husband, who had lived and done business in Washington, but which husband had never maintained a home or dwelling house so as to be in position to claim a homestead, is entitled, by virtue of the statute of that state to be awarded property in an amount not to exceed \$3000 in value, in lieu of a homestead, although she is a non-resident.—*In re Lavenberg's Estate*, 104 Wash. 515, 177 Pac. 328. The purpose of the Washington statute was to give a widow and minor children the benefit of a homestead when none had been claimed by "the head of a family in his lifetime"; but all parts of it which required a "setting aside" were superseded by the act of 1895, which made the act of declaring a homestead a matter entirely independent of any proceeding in court.—*Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659. A contract between a man and his wife, after marriage, that, upon the death of either, the survivor shall not receive "any right, title, or interest" in the separate estate of the other spouse, is to be strictly construed; it does not preclude the widow from in-

voking the benefit of the statute, giving to her and to the minor children the benefit of a homestead.—*Scott v. Stark*, 75 Wash. 610, 613, 135 Pac. 643. On the death of the father while living with his minor children on the homestead, his wife being in an insane asylum, if the guardian lease the homestead, the rents inure to the benefit of the widow and minor children. (So held, adversely to older children who were married and brought the suit).—*Smith v. Landis*, 93 Kan. 453, 144 Pac. 998.

(8) Same. Right of surviving Indian spouse to homestead.—The right of a surviving spouse under section 6328, Rev. Laws, 1910, to possess and occupy the homestead of a decedent applies to an allotment of a full-blood Indian of the Five Civilized Tribes.—*Belt v. Bush* (Okla.), 176 Pac. 935, 937. Under section 6328, Rev. Laws, 1910, the right of the surviving spouse to occupy and possess the homestead of the decedent continues so long as such spouse preserves its homestead character by maintaining a home thereon.—*Belt v. Bush* (Okla.), 176 Pac. 935, 937. An allotment of a full-blood Indian of the Five Civilized Tribes, is not deprived of its homestead character because the dwelling house and outbuildings used and occupied by the allottee and her family from the date of the allotment until her death was situated on an adjoining allotment where such improvements were purchased by the allottee at the time of the allotment under the belief that they were on her allotment and the truth was not discovered until shortly before her death, after which she continued to occupy them until her death as the family homestead.—*Belt v. Bush* (Okla.), 176 Pac. 935, 937.

(9) Nature of right.—The right of a widow to a family allowance is not only statutory, but it is one strongly favored. She is entitled to her allowance even before letters of administration are granted. After the issuance of such letters in a solvent estate, she is entitled to a family allowance during the progress of the settlement of the estate.—*Estate of Welch*, 106 Cal. 427, 432, 39 Pac. 805. The power of testamentary disposition of property, as conferred and defined by statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate. In other words, section 1465 of the Code of Civil Procedure of California, which provides that all property exempt from execution, including the homestead, shall be set apart for the use of the family, is paramount to the right of testamentary disposition.—*Sulzberger v. Sulzberger*, 50 Cal. 385; *Estate of Davis*, 69 Cal. 458, 460, 10 Pac. 671; *Estate of Lahiff*, 86 Cal. 151, 24 Pac. 850. The section mentioned is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and so to withdraw it from the disposition made by the testator under his will.—*Estate*

of Walkerly, 108 Cal. 627, 655, 49 Am. St. Rep. 97, 41 Pac. 772. Thus, despite the fact that a farm has been specifically devised, one half to the widow and the other half to two children, it is competent for the probate court to set it aside as a homestead, for the right of a testator to devise is subordinate to the power of the probate court to sequester and set apart the property for the shelter, care, and support of the family.—Estate of Hurlsmann, 127 Cal. 275, 276, 59 Pac. 776. The right of testamentary disposition is itself only a right given by statute, and may be restrained, modified, or abrogated entirely. But, still, it is unquestionably the general policy of our law to allow full power of testamentary disposition, save as that power may be abridged by specific enactments. The code provisions making disposition of the homestead and of estates in value less than fifteen hundred dollars are instances of the limitations put by the legislature upon the free power of testamentary disposition, and from the lack of uniformity and harmony in their terms, these homestead provisions have presented questions of much doubt and vexation to the courts.—Estate of Walkerly, 108 Cal. 627, 653, 49 Am. St. Rep. 97, 41 Pac. 772. In some states of the Union, there are statutes conferring on probate courts power to provide an allowance for the support of the family for longer or shorter periods. Some of these statutes limit a family allowance to cases of intestacy, or to cases in which no provision is made by a will, or, if made, where such provision is waived by the widow. The California statute is not so limited.—Estate of Walkerly, 77 Cal. 642, 645, 20 Pac. 150. And the word "heirs," in the California statute, does not include devisees.—Estate of Walkerly, 108 Cal. 627, 655, 49 Am. St. Rep. 97, 41 Pac. 772. The right of a widow, who is a member of the family of the deceased, and entitled to support from him at the time of his death, to have such family allowance from the estate as may be reasonably necessary for her support during the settlement of the estate, being fixed by the statute, it is not within the power of the husband, by any provision of his will, to deprive her of this right, or in any wise to limit the power of the court in the exercise of its proper discretion to fix the amount to be allowed.—Estate of Bump, 152 Cal. 274, 92 Pac. 643, 644. Nor can the executor or administrator legally enter into any agreement, or make any arrangement with the widow, or any one else interested in the fund growing out of a family allowance, for its application to the payment or satisfaction of his personal obligations. Such an arrangement, which appropriates a fund for the support of the family of the deceased, would be subversive of the policy of the law, and void. Therefore the consent of the widow, if such consent was given, that the personal obligation of the administrator might be satisfied out of the family allowance, would not make valid what the law pronounces void. The allowance is as much for the advantage of the children of the deceased as for the widow, and it can not be affected by any agreement or understanding between the widow and the administrator which would have the

effect of depriving the children of it, or to divert it to any other use than that specified in the law.—*Moore v. Moore*, 60 Cal. 526, 530. An allowance to a widow is a preferred claim against an estate. It is no part of her distributive share of the estate, but is rather a charge or claim against the estate. It is in fact nothing more nor less than a part of the costs of administration.—*Wilson v. Wilson*, 55 Colo. 70, 132 Pac. 70. The widow's claim to a family allowance is strongly favored in our law. . . . A family allowance bears an analogy to a probate homestead in that it may be ordered even out of property specifically devised.—*Estate of Whitney*, 171 Cal. 750, 154 Pac. 855. The wife's right to continue to use and to occupy the homestead during her lifetime, after her husband's death, is her individual right; it is not an interest in his property; it is not subject to his testamentary disposition and does not pass under his will; the homestead can not even be sold, over the wife's objections, under the terms of her husband's will, directing property to be sold to pay bequests, except subject to her right to use and to occupy the same during her lifetime.—*Bacus v. Burns*, 48 Okla. 285, 149 Pac. 1115; 48 Okla. 297, 149 Pac. 1118. The code, where it provides that personal property and money of the decedent, exempt from execution, shall be allowed and set apart to the surviving wife, or husband, or to the minor child or children, is not a law of succession, the allowance being rather in the nature of a preferred claim against the estate; the statute is a limitation upon the power of the testator to bequeath.—*In re James' Estate*; *Bigelow v. Booth*, 160 N. W. 525, 38 S. D. 107, 112, 160 N. W. 525. A widow's allowance has not the nature of an interest in the estate; it is a preferred claim against the estate, rather than something that goes to her by descent.—*Deeble v. Alerton*, 58 Colo. 166, 170 Ann. Cas. 1916C, 863, 143 Pac. 1096. A widow's allowance has not, in Colorado, the nature of an interest in the estate, nor does it go to the widow by descent; it is a preferred claim against the estate, to be paid out of the personalty, if this is sufficient, and, if it is not, by a sale of the realty under order of court.—*Grover v. Clover* (Colo.), 169 Pac. 578. The right of the widow to an allowance for her maintenance pending issue of letters of administration and the settlement of her husband's estate, is not a vested right in the property of the decedent; it is the mere right to prefer a charge, and its allowance may or may not be granted.—*Estate of Moore*, 170 Cal. 60, 62, 148 Pac. 205. The widow's allowance provided for by section 7223, Rev. Stats. of Colorado, is not a distributive part of the estate, and is nothing more nor less than a part of the costs of administration.—*Deeble v. Alerton*, 58 Colo. 166, 170, Ann. Cas. 1916C, 863, 143 Pac. 1096.

(10) Application or petition. "Family."—It is not necessary that the widow herself should petition for the allowance. The order may be made upon a petition by any one in her behalf, and the fact that the executor was also her son should not prevent a petition made by him on her behalf from receiving the same consideration by the court as



though he had not held that office.—*Estate of Garrity*, 108 Cal. 463, 468, 38 Pac. 628, 41 Pac. 485. A petition to set aside a homestead which sets forth a making and return of the inventory of the decedent; the description and ownership of the real property returned in the inventory; that such property was that of the deceased; that its value would not exceed five thousand dollars; and that no homestead had ever been designated or selected by deceased or his widow during his lifetime,—is sufficient, under the statute of Idaho, to entitle the widow to have the property therein described set off as a probate homestead.—*In re McVay's Estate*, 14 Ida. 56, 93 Pac. 28. The word "family," in its ordinary signification, refers to two or more persons, and includes those living under the same roof as kindred or dependents, and under one head; but this word, as used in the statute concerning probate homesteads, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member. The object of the statute is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such, and the right of the surviving husband or wife to retain this home for such period as the court may direct does not depend upon the fact that there are children or others who may share in its use.—*Estate of Lamb*, 95 Cal. 397, 407, 30 Pac. 568. The term "family" is used as synonymous with and as representing the surviving wife or husband and children, if any; and when the term "family" is used in the decree setting apart the homestead, it expresses the meaning, and is used in the sense of that word in the statute, and is therefore sufficiently explicit to describe the widow and children.—*Phelan v. Smith*, 100 Cal. 158, 170, 34 Pac. 667. A judgment denying a family allowance to a widow precludes her from proceeding further under the original petition, and inures to the benefit of all creditors of the decedent.—*Estate of Bell*, 153 Cal. 345, 95 Pac. 378. Where a man and woman, owners of separate income bearing property, execute, on becoming husband and wife, an instrument whereby the income from the properties of both shall be regarded as community property, while the properties themselves shall remain separate as before, the execution of this instrument does not cut off, on the man's death, the widow's right to a family allowance out of his estate.—*Estate of Finch*, 173 Cal. 462, 464, 160 Pac. 556. Sections 1465 and 1466, Code of Civil Procedure of California, was enacted to make provision for the family of a decedent prior to distribution and one not a member of such family is not entitled to participate in such family allowance.—*In re McSwain's Estate*, *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 119. Sections 1465 and 1466 of the Code of Civil Procedure of California, relate to the same subject, and should be construed together, and so construing them the family consists of the surviving husband or wife, if any, and the minor children, if any, of the decedent, in both sections.—*In re McSwain's Estate*; *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 119.

(11) *Proof of right.*—Of course, there must be proof of the applicant's right to a family allowance. Whether or not the petitioner is a child of the decedent is a question of fact for the court to determine before denying or granting the application, and the mere fact that the petitioner's status as a child of the decedent is denied does not deprive the court of jurisdiction to make the order of allowance, if the facts showing the petitioner's right are proved by competent evidence.—*Estate of Blythe*, 99 Cal. 472, 474, 34 Pac. 108. And the widow is a competent witness to prove any fact respecting the family allowance. The statute providing that "parties to an action or proceeding, or in whose behalf a proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of the deceased," does not apply to such a case. That statute refers to an action or proceeding which is adverse to the estate, by which some relief is sought which will diminish or impair the estate. But an application for a family allowance is not an action or proceeding against an executor or administrator. It is similar to an application for a partial or final distribution of the estate, or the payment of a legacy.—*Estate of McCausland*, 52 Cal. 568, 576.

(12) *Notice not required.*—As the widow is entitled to an allowance as a matter of right, no notice of the court's intention or action in the matter is required, nor is a formal application absolutely necessary.—*In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, 40. The legislature has full power to provide that a part of the estate shall thus be subject to the order of a probate court without notice other than the notice of the application for administration thereon. The statute, in so far as it authorizes the making of orders setting apart exempt property and the homestead to the widow, and for the payment of money to her out of the estate for her support, without notice to the heirs, devisees, or legatees, is not unconstitutional as being against due process of law. The making of such orders without notice is a part of the statutory proceeding of the administration of the estate, which is initiated by the giving of a general notice as prescribed by the statute. These notices constitute due process of law, and are sufficient to give the court jurisdiction to make all the subsequent orders in the proceeding, as to which special additional notice is not required. The right of inheritance and testamentary disposition is entirely the creation of the statute, and the heirs, devisees, and legatees take the property subject to such burdens as the legislature has seen fit to fix upon it, among which is the burden of supporting the widow and children of the deceased whenever the court having jurisdiction of the estate shall make an order to that effect.—*Estate of Bump*, 152 Cal. 274, 92 Pac. 643, 644. If the statute in any particular jurisdiction requires notice, and an order has been made *ex parte* without notice, but there is a hearing of objections, after due notice given, a *nunc pro tunc* order may be made covering the same items

included in the former order, if they were proper ones for allowance under the law.—*In re Murphy's Estate*, 30 Wash. 9, 70 Pac. 109, 110.

(13) *Considerations in fixing.*—The court is not restricted, in making a family allowance, to a bare support of the widow. Regard should be had to the mode in which she lived during the lifetime of her husband. The allowance is to be sufficient to provide all the necessities of life, and this will include all those things which are reasonable and proper for use in the home and in social intercourse, in view of the condition and value of the estate and station and surroundings of the family.—*Estate of Stevens*, 83 Cal. 322, 325, 17 Am. St. Rep. 252, 23 Pac. 379; *Estate of Lux*, 100 Cal. 593, 605, 35 Pac. 341. The court may also take into consideration the character and amount of the estate left, and the provision the husband sought to make for the benefit of the widow, as well as her actual necessities.—*In re Drasdo's Estate*, 36 Wash. 478, 78 Pac. 1022, 1023. In fixing the amount of the allowance, the ages of the survivor or survivors, their health, their social position and standing, the education of the children, the value of the estate, and its solvency or insolvency, are proper subjects for consideration.—*In re Pugley's Estate*, 27 Utah 489, 76 Pac. 560, 562. Where a wife who had been living apart from her husband under articles of separation applies for a family allowance and had knowledge of fraudulent acts of her husband which would nullify the effect of such separation articles, as a bar to her receiving such allowance, it was incumbent upon her to have pleaded the fraud. In the absence of such pleading the rights of the parties must be adjudicated in accordance with the articles of separation.—*Estate of Yoell*, 164 Cal. 540, 129 Pac. 999. Where it is provided in the will that the widow may draw from the estate all the money required for her support and maintenance, the word "require" will not be interpreted to mean an amount needed or necessary for such purpose, but it will be held to include such sum or sums as she may request or wish to use for such purpose.—*Blair v. Blair*, 82 Kan. 464, 108 Pac. 827. Even if the estate be solvent, the family is entitled to such "reasonable allowance out of the estate as shall be necessary for" their maintenance "according to their circumstances," during the whole of the year prescribed, if the estate is properly in progress of settlement so long, and the court may not restrict such "reasonable allowance" to a specified part of such year. The determination of the time during which a "reasonable allowance" shall be paid does not rest in the sound discretion of the court.—*Estate of Treat*, 162 Cal. 250, 121 Pac. 1003. In exercising its discretion in respect to fixing the allowance to the widow, the court should have in mind the circumstances and condition of the estate and the reasonable wants and necessities of the widow as disclosed by the evidence.—*Estate of Cowell*, 170 Cal. 362, 149 Pac. 808. Where the personal property ordered to be set aside for the use of the widow and children, or either, is insufficient for their support, and if there be other estate the court may make a reasonable allowance thereout for

the maintenance of the family, under sections 5265-6 of the Compiled Laws of Oklahoma 1909.—*Halle v. Hale*, 40 Okla. 101, 135 Pac. 1143, 1145.

(14) **Objections. Exceptions.**—Where a reasonable period has elapsed, after a family allowance has been made to the widow, for the settlement of the estate, persons who are interested therein have the right to object to a continuation of the allowance, although they could have compelled the administrator to settle and distribute the estate promptly, but failed to do it. And indulgence in the matter is no excuse for the neglect of the administrator to settle the estate.—*In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, 41. Under the Utah statute, where there is no property answering to the statutory specifications which might be turned over to the widow, she is entitled to an equal value of money or other property, at her election. And she must elect; but upon her election to take either the property or the money, it becomes the duty of the administrator or of the court to allow it to her. The duty is not discretionary; it is mandatory; and an exception by a bank, to the report of the administrator, showing a money allowance to the widow, on the ground that she "had elected" to take money in lieu of the statutory property, is a solemn admission by the bank that she had made her election and so entitled herself to the money; and such admission is conclusive upon the bank and upon the court.—*Western Nat. Bank v. Rizer*, 12 Colo. App. 202, 55 Pac. 268, 269.

(15) **Fixing amount. When not excessive.**—The fact that the administrator has not in his hands sufficient money to pay the family allowance does not deprive the court of the power to fix the amount to be paid. If there is other estate which can be subjected to this payment, the court can make a proper order therefor.—*Estate of Carriger*, 5 Cal. Unrep. 129, 41 Pac. 700, 701. Where an estate was of the value of fifty thousand dollars, and produced an income of over fifteen hundred dollars per month, an allowance to the widow of the household goods, furniture, wearing-apparel, and personal effects of the testator, and two hundred and fifty dollars a month for her maintenance, pending the settlement of the estate, is not excessive.—*Estate of Drasdo*, 36 Wash. 478, 78 Pac. 1022, 1023. Much is left to the discretion of the judge in determining the amount of the family allowance under section 1464, Cal. Code. Civ. Proc., until the return of the inventory, and his action will not be disturbed on appeal unless it clearly appears that it has been improperly exercised.—*Estate of Cowell*, 164 Cal. 636, 130 Pac. 209.

(16) **Widow is entitled to, when.**—The widow has absolute right to a reasonable provision for her support during the administration of her husband's estate.—*Estate of Stevens*, 83 Cal. 322, 325, 17 Am. St. Rep. 252, 23 Pac. 379; *In re Pugley's Estate*, 27 Utah 489, 76 Pac. 560, 562; and it makes no difference that the widow has sufficient

property of her own out of which to support herself.—Estate of Lux, 100 Cal. 593, 35 Pac. 341, 344; Estate of Bump, 152 Cal. 274, 92 Cal. 643, 644. The right to allowance is not affected by the separate estate of the widow. Even a non-resident widow is entitled to a family allowance, notwithstanding she has abundant means of her own with which to support herself.—Griesemer v. Boyer, 13 Wash. 171, 43 Pac. 17, 18. The right of the widow and children is paramount to that of creditors, and does not depend upon the solvency or the insolvency of the estate.—Griesemer v. Boyer, 13 Wash. 171, 43 Pac. 17, 19. The widow's delay in demanding a family allowance does not forfeit her right to it; and she has a right to a family allowance when a special administrator has been appointed after the suspension or removal of the general administrator.—Estate of Welch, 106 Cal. 427, 432, 433, 39 Pac. 805. The right of the widow to a family allowance is not lost because of her immoral conduct during marriage. The husband's legatees cut her off from her rights as widow by showing that her ways were not the ways of continence and sobriety.—In re Drasdo's Estate, 36 Wash. 478, 78 Pac. 1022, 1023. She is entitled to a family allowance, although she wrongfully appropriated the money of her husband to her own use during his lifetime, and she is also entitled to the rights of a widow where she has refused to abide by the terms of her husband's will, notwithstanding previous allowances made to her.—Estate of Bump, 152 Cal. 274, 92 Pac. 643, 645. Of course, if a wife accepts a devise conditioned that she will relinquish all further claims to her husband's estate, she must abide thereby; but until she does elect to take under the devise, she is entitled to the enjoyment of her statutory rights and to the allowance made to her thereunder.—Estate of Lufkin, 131 Cal. 291, 293, 63 Pac. 469; and see Estate of Bump, 152 Cal. 274, 92 Pac. 643, 644. In Oregon, where the property of the estate exempt from execution has been devised and bequeathed by the testator to his children, and the estate is sufficient to satisfy all the debts and liabilities of the deceased, and to pay the expenses of administration, together with a monthly allowance to the widow and children, the right of the county court to order a monthly allowance to the widow can not be successfully controverted.—Dekum's Estate, 28 Or. 97, sub nom.; Dekum v. Dekum, 41 Pac. 159, 160. The widow is not chargeable, as executrix, with profits received from the subletting of rooms in a house hired by her, the rental of which was paid out of her monthly allowance.—Estate of Stevens, 83 Cal. 322, 326, 17 Am. St. Rep. 252, 23 Pac. 379. An order granting a family allowance made after the filing of the inventory, which has become final, is conclusive in favor of the right of the widow to receive the amount directed to be paid to her, so long as the order remains in force and the fact that upon proceedings for partial distribution almost all of the estate had been set over to the persons entitled thereto and that the widow had come into possession of practically her whole share of the estate and that she had acquiesced in the discontinuance of the

payment of the allowance for more than two and a half years, does not affect her right to claim such allowance.—*Estate of Nelson*, 167 Cal. 321, 139 Pac. 692. A separation agreement between husband and wife in which there is no specific waiver to a claim for a widow's allowance does not deprive the wife of such allowance as provided in section 7223, Rev. Stats. of Colorado.—*Deeble v. Alerton*, 58 Colo. 166, 170, Ann. Cas. 1916C, 863, 143 Pac. 1096. A widow is not deprived of her right to an allowance for her support and maintenance for a period of six months, under the statute of New Mexico, by accepting the provisions of her deceased husband's will, which gives to her a designated sum and states that the same is to be in lieu of all other demands against his estate.—*Andros v. Flournoy*, 22 N. M. 582, 4 A. L. R. 387, 166 Pac. 1173. Where a testator's wife executed a paper, at the time of the execution of the will, electing to take under the provisions of the will and to waive her community rights "and any and all other claims," she did not thereby debar herself from asking for a family allowance.—*Estate of Whitney*, 171 Cal. 750, 154 Pac. 855. The fact that a widow has property of her own, or other means of subsistence, in no way affects her rights to a preliminary allowance from the estate of her deceased husband as is reasonably necessary for her support. The statute gives her this right to be so supported by the estate, regardless of her own means.—(See *Estate of Lux*, 100 Cal. 604, 605, 35 Pac. 341; *Estate of Bump*, 152 Cal. 276, 92 Pac. 643). And it also appears to be settled in this state, even as to an allowance made under section 1466, Code of Civil Procedure of California, after the return of the inventory, that the fact that the widow is given property by the will of her husband in no way affects her right to be given, by way of allowance for support, such sum as is reasonably necessary therefor, leaving the property given her by the will, whether distributed pending the administration, or at the close of it, to go to the widow intact, and undiminished by any charge for expense of administration or support of family.—*In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209. Under the California code provisions (sections 1464, 1466, and 1467, Code Civ. Proc.) the widow is entitled to an allowance which may be retroactive, covering the period from the date of her husband's death, and the fact that she failed to apply for such allowance until after remarriage does not affect her right or prevent her from receiving it.—*Estate of Moore*, 170 Cal. 60, 62, 148 Pac. 205. Under sections 1465, 1466 of the California Code of Civil Procedure, a woman, surviving her husband, has the right to have a reasonable allowance made by the court for her support from his estate, whether the latter was community property or his separate estate, and irrespective of whether she has property of her own from which a livelihood may proceed.—*Estate of Finch*, 173 Cal. 462, 160 Pac. 556. No reproach attaches to a widow for procuring to herself every benefit and protection from her husband's estate which the law allows her.—*Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623.

(17) To be made when.—A widow is not to be denied a family allowance because she has sufficient property of her own to support herself. The court must make a reasonable allowance out of the estate, if the portion set apart for the family allowance is insufficient for her support; and for the court to hold that no allowance shall be made to the widow if she has sufficient property of her own, although the property set apart to her is insufficient of itself for her support, would be, in effect, an amendment of the law by judicial construction.—*Estate of Lux*, 100 Cal. 593, 603, 35 Pac. 341. The widow is entitled to have such reasonable allowance as is necessary for her maintenance during the progress of the settlement of her husband's estate.—*Estate of Roberts*, 67 Cal. 349, 7 Pac. 733, 734. She is entitled to this, notwithstanding provision has been made for her in the will, and until such time as the disposition of property contained in the will becomes available for her use.—*Estate of Walkerley*, 77 Cal. 642, 646, 20 Pac. 150. But, under the statute of Utah, where the estate is solvent and out of debt, the value of such part of the homestead as may be set aside to the widow should be deducted from her distributive share, as provided for in the statute. She can not have both, unless such design on the part of the testator clearly appears from the will.—*In re Little*, 22 Utah 204, 61 Pac. 899. Where the widow, under the statute, is entitled to certain enumerated property, and the deceased does not have such property, she is entitled to other property, or the value of the articles specified in the statute, and it is the duty of the administrator or of the probate court to allow the value in money, or other personal property, at the widow's election.—*Western Nat. Bank v. Rizer*, 12 Colo. App. 202, 55 Pac. 268. The statute providing for a family allowance was doubtless intended to make immediate provision for the family when the head of it is removed by death, and such provision is to continue during the administration of decedent's estate. But where there is no family, no allowance can be made; as, where the husband and wife had, for many years prior to the husband's death, been living separate and apart from each other, and had so lived up to the time of his death, and the wife had never been, during such period, dependent upon him for support, she does not constitute the "immediate" family of the deceased, and the court may properly refuse to make an allowance to her as the widow of the deceased.—*Hilton v. Stewart*, 25 Utah 161, sub nom.; *In re Park's Estate*, 69 Pac. 671. Funeral expenses must be paid before the family allowance is made.—*In re Thorn's Estate*, 24 Utah 209, 67 Pac. 22, 23. The preliminary or temporary allowance, required to be made for the widow or minor children by section 1464, Code of Civil Procedure of California, terminates upon the return of the inventory (*Crew v. Pratt*, 119 Cal. 137, 51 Pac. 44; *Estate of Bell*, 142 Cal. 100, 75 Pac. 679), when the court may make an order for such allowance as may be necessary during the further progress of the

settlement of the estate. (See Code Civ. Proc., sec. 1466).—In *re* Cowell's Estate, 164 Cal. 636, 130 Pac. 209.

## REFERENCES.

Widow's right to year's support or allowance out of insurance money.—See note 46 L. R. A. (N. S.) 788. Widow's right to year's support or allowance out of fund recovered for the negligent killing of husband.—See note 42 L. R. A. (N. S.) 725. Widow's right to exemption or allowance for support out of personal assets of estate of deceased husband, who was a non-resident.—See note 11 L. R. A. (N. S.) 361-363.

(18) Widow is not entitled to, when.—A family allowance should not be made to the widow of decedent, where she, at the time of his death, was not a member of his immediate family, as where the husband and wife were voluntarily living apart under an agreement for separation.—*Estate of Noah*, 73 Cal. 583, 2 Am. St. Rep. 829, 15 Pac. 287, 88 Cal. 468, 26 Pac. 3611; *Hilton v. Stewart*, 25 Utah 161, sub nom.; In *re* Park's Estate, 69 Pac. 671; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358. Nor is the widow entitled, under such circumstances, to have a homestead set apart from her husband's separate property, even for a limited period.—*Wickersham v. Comerford*, 96 Cal. 433, 439, 31 Pac. 358. So if a wife, supposing her husband to be dead, marries a second time, she can not claim a family allowance from the estate of her former husband, so long as the second marriage has not been annulled by a competent tribunal, for, until such annulment, the second marriage is valid.—*Estate of Harrington*, 140 Cal. 294, 295, 74 Pac. 136. Where the petition for the family allowance fails to state that a homestead set apart to the widow and children is insufficient for the support of the family, an order refusing to make a family allowance out of the estate of the decedent is not erroneous, where it appears that a homestead had been set apart to the widow and children.—*Estate of Luther*, 67 Cal. 319, 7 Pac. 708. The court is also justified in refusing to ratify any family allowance made after the estate is ready for distribution. The widow, as executrix of her husband's estate, can not properly delay the settlement of the estate in order that she may consume the whole of it by means of her allowance.—In *re* Dougherty's Estate, 34 Mont. 336, 86 Pac. 38, 41. Where the fact of marriage is disputed, and the person claiming to have been the wife of the deceased has, as his widow, filed a petition asking for the appointment of an administrator, and the same has been decided in her favor, and an appeal has been taken therefrom to review and finally determine the very question of the marriage relation, the superior court, pending the appeal, has no jurisdiction to make an order allowing such person, so claiming to be the widow, anything for her maintenance pending the appeal; otherwise the proceeds of the estate might, in some instances, thereby become exhausted, and the contestant thus be deprived of the fruits of the



litigation by a person having no right whatever to the same; and while, in some instances, this might result in hardship, in preventing a person lawfully entitled to the benefits of such a provision from having the same pending the appeal, yet this can not, of itself, alter the rule of law in relation thereto.—*State v. Lichtenberg*, 4 Wash. 231, 29 Pac. 999. Where a family allowance has been made to a widow and minor children, but the widow marries, the court may continue the allowance, if necessary for the benefit of the children; but when their mother ceases to be the widow of deceased, she can not claim, as a perquisite for herself or for her new husband, a family allowance from the estate of her former spouse.—*Estate of Still*, 117 Cal. 509, 49 Pac. 463, 465. Where persons, contemplating matrimony, enter into a written agreement whereby a stipulated provision for the wife is made, out of the husband's estate, both during their joint lives and after his death, the widow can not, on his demise, claim a greater provision by way of a family allowance.—*Estate of Cutting*, *Cutting v. Cutting*, 174 Cal. 104, 161 Pac. 1137. A marriage settlement, in order to be effective as between the parties to it, does not need to be recorded.—*Estate of Cutting*, *Cutting v. Cutting*, 174 Cal. 104, 161 Pac. 1137. A surviving widow who had separated from her husband and ceased to be a member of his family or entitled to his support at the time of his death is not entitled to participate in the family allowance.—*In re McSwain's Estate*, *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 119. Where there are no minor children, then the family allowance is for the widow alone and "the rule seems to be that a widow may by appropriate and sweeping provisions of an ante-nuptial contract (and so of course of a post-nuptial contract) waive her right to an allowance when the rights of minor children are not involved."—*In re Yoell's Estate*, 164 Cal. 540, 129 Pac. 999.

(19) To children.—The family allowance is as much for the advantage of the children of the deceased as for the widow.—*Moore v. Moore*, 60 Cal. 526, 530. It is not made "for the use of the family," but, by the terms of the statute, for its "maintenance" while the estate is in progress of settlement and its property is in the custody of the executor or administrator, and this includes the duty of keeping its members under the same roof with the common interest of a home, as well as the expense incurred for food and raiment or for education and health. Upon the death of the father, the maintenance of the family devolves upon the mother, and it is for the purpose of enabling her to discharge this duty that the court is authorized to appropriate a portion of the property of the estate. The allowance is not made merely for the purpose of enabling her to defray the several expenses incurred for each member of the family, but that she may also provide a means whereby she and the minor children may be kept together and the family may be maintained as a whole. A provision, in the statute, that the court "must make such reasonable allowance out of the estate as shall be necessary for the

maintenance of the family according to their circumstances" implies that, before making the order, the court will ascertain the circumstances of the family, and of the estate out of which the allowance is to be made. This will involve an inquiry, among other matters, into their habits and mode of life during the lifetime of the decedent; the requirements of the several members of the family—depending upon their age and conditions—whether for education, physical support, or health, and also the condition and extent of the property belonging to the estate. The amount which, upon such consideration, the court determines will be reasonable is properly directed to be paid to the widow as the person charged with the maintenance of the family, and it then becomes a judgment in her favor for that amount. The minor children have no claim to any portion of the allowance thus made to her, nor is it held by her in trust for them. Certainly, the legislature did not intend that one-half of the allowance should belong to her, out of which should be paid the cost of her maintenance, and that an equal part of the other half should belong to each child, out of which should be paid only the cost of supporting that child. In determining the amount to be paid, the court does not attempt to fix the amounts which will be consumed for each member of the family, but aggregates the needs of the family as a whole and makes an allowance which it considers would be reasonable for those needs. It is of universal experience that the same expense is not incurred for each child, and that there are many expenses which do not appertain to either child, but which are incurred for the family as a whole; and there are also many duties of the mother which are not susceptible of pecuniary measurements. The expenses incurred for the infant, which requires the mother's care, the child at school, or the youth preparing for the duties of manhood or womanhood in the years before majority are not the same; and the rent of the home, its furniture, the expense or reparation, wages of servants, cost of equipage, and numerous other items, are a charge upon the family as a whole, and are not to be apportioned among the individual members thereof. The amount of the allowance is fixed, with the view that it will be entirely consumed in maintaining the family, and if, in this respect, the court errs, whether by making the allowance too large or too small, it is an error in its judgment, which can be corrected only upon a further application, setting forth the grounds upon which the amount of the allowance should be modified. Until such change, if there be any portion which is not expended, it is the property of the widow, and if the expenses are greater than the allowance, the loss must be borne by her. Upon these considerations, it must be held that the widow to whom the court directs a family allowance to be paid is not required to account to her children for the manner in which such allowance has been expended.—*Bell v. Bell*, 2 Cal. App. 338, 340, 83 Pac. 814. But the allowance can not be affected by any agreement or understanding

between the widow and administrator which would have the effect of depriving the children of it, or of diverting it to any other use than that specified by the law.—*Moore v. Moore*, 60 Cal. 526, 530. If a minor, being within sixteen days of the age of majority, makes an application to the court to have the personal property left by his parents set apart to him, and there is no showing in the application that such property is necessary for his support during such sixteen days, it is not error for the court to deny the application.—*Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116, 118. The word "children" is not confined in its significance to minors, when used in the statute whereby the widow shall be allowed to keep absolutely, for the use of herself and the children, of the deceased all personal property of his, at the time of his death exempt from execution.—*Spencer v. Barker*, 96 Kan. 360, 149 Pac. 736. When application is made for an allowance for a minor child independent of the regular family allowance, it was clearly wrong for the court to refuse to allow the mother to testify that she was able and willing to support her child out of the family allowance as she in her discretion believed was proper and necessary.—*In re McSwain's Estate*, *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 120. In the absence of evidence to the contrary it is presumed that the widow was a proper person to receive the family allowance, and, as a parent, entitled to have the care, custody, and education of her minor child.—*In re McSwain's Estate*, *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 120. Though application for family allowance for infant beneficiaries of estate may be made without appointment of guardians ad litem, such guardian may be appointed, under the California Code Civ. Proc., section 372, as in an "action" or "proceeding."—*In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446. An allowance to minor children before setting apart exempt property and homestead is not premature.—*In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446. Where a decedent left a family consisting of a wife and child, in the absence of evidence to the contrary it is to be presumed that the widow is the proper person to receive the family allowance, she being entitled to have the child's care, custody, and education, and intrusted with that duty by law.—*Estate of McSwain*, 176 Cal. 280, 168 Pac. 117. Where the court makes an allowance to the widow in a sum deemed by it sufficient to meet the family expenses, it will not, as a rule, make a separate allowance to a child.—*Estate of McSwain*, 176 Cal. 280, 168 Pac. 117. The statute of Colorado does not have the effect of authorizing an allowance to the minor orphan of a deceased mother.—*Smith & Co. v. Quinn*, 60 Colo. 281, 153 Pac. 217. It is to the estates of deceased husbands only, and not of deceased wives, that the law applies whereby an allowance to a minor orphan is authorized.—*Smith & Co. v. Quinn*, 60 Colo. 281, 153 Pac. 217. Children of a decedent, adopted, pending the settlement of the estate, into another family, become identified with the latter, and an application to have a life insurance fund, payable to the estate, set apart to them as exempt must

be refused.—*Estate of Pillsbury*, 175 Cal. 454, 166 Pac. 11. The right of minor children to the use and occupancy of the homestead during their minority is a statutory one, and, in the absence of statute, such right does not exist in Oklahoma.—*Miles v. Miles* (Okla.), 175 Pac. 222. Where a family allowance presumably sufficient was made, and afterwards a minor daughter left home and took up her residence with others without cause, the persons with whom she lived, or her guardian, if some one other than her mother, would have to look to the mother for the support of the child.—*In re McSwain's Estate*, *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 120. If a man dies, leaving separate property and a number of minor children but no widow, the court can not set apart in fee certain of the real property owned by the deceased, as a homestead for the minor heirs, where the intestate had never filed a declaration of homestead; the power of the court is limited to setting aside such homestead for a limited period, with an allowance for support.—*In re Hedemark's Estate*, 77 Wash. 525, 137 Pac. 1031. Adult children who had left the family home and were providing for themselves at the death of decedent are entitled to no support out of the estate pending administration.—*In re McSwain's Estate*, *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 119.

(20) Order. In general.—Though there can be no family allowance subsequent to a widow's death, the amount allowed to her before death, and which was unpaid at the time of such death, is property of her estate, going to her heirs or personal representatives.—*Estate of Lux*, 114 Cal. 73, 81, 45 Pac. 1023. And all property exempt from execution, set apart for the family, including the homestead selected, is exempt from execution.—*Holmes v. Marshall*, 145 Cal. 777, 781, 104 Am. St. Rep. 86, 2 Ann. Cas. 88, 69 L. R. A. 67, 79 Pac. 534. A family allowance, made before exempt property and the homestead are set apart, is made subject to the rights of the designated beneficiaries to have a homestead and the exempt property set apart for their benefit, and is not a charge or lien upon the family home.—*Estate of Still*, 117 Cal. 509, 513, 49 Pac. 463. The provision made by a testator for the support and maintenance of his widow can not be used or diverted to uses or purposes wholly foreign to her maintenance or personal expenses.—*Blair v. Blair*, 82 Kan. 464, 108 Pac. 827. While, as a prerequisite to an order for family allowance under section 1466 of the Code of Civil Procedure of California, certain facts must be determined by the trial court, there is nothing in the statute requiring the question of solvency or insolvency of the estate to be so determined.—*Estate of Treat*, 162 Cal. 250, 121 Pac. 1003. A finding and adjudication of the question of the solvency or insolvency of the estate is not implied from the mere making of an order for family allowance, within a year after the granting of letters, at least in the case of an order which does not in express terms prescribe the period during which the allowance shall continue.—*Estate of Treat*, 162 Cal. 250, 121 Pac. 1003.

## REFERENCES.

Right of estate of one, entitled by will or statute to an allowance for support and maintenance, to accumulations undrawn and unexpended at the time of her death.—See note 9 L. R. A. (N. S.) 997, 998.

(21) **Order. Duration, modification, cessation, and suspension.**—Upon the filing of the petition for letters, and when the court is without definite information concerning the value of the estate, which is afforded by the inventory and the appraisement, it may make an allowance for the widow and the children of decedent, which is in the nature of a preliminary or temporary allowance, not extending beyond the return of the inventory, after which time it becomes the duty of the court to make a further allowance, if the property set apart to the family is insufficient for their support, and which allowance is to be of a more permanent character, and to continue during the administration of the estate.—Estate of Lux, 100 Cal. 593, 599, 35 Pac. 341; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38; Estate of Welch, 106 Cal. 427, 39 Pac. 805; unless the estate is insolvent, in which case it is not to continue longer than one year.—Estate of Lux, 100 Cal. 593, 599, 35 Pac. 341; Estate of Montgomery, 60 Cal. 648; Estate of Walkerley, 77 Cal. 642, 20 Pac. 150. The order for family support, when made, may be subsequently modified by the court, if the condition of the estate or the relation of the family thereto should change; as, if, for instance, it should appear that the value of the estate was materially less than shown at the date of the order sought to be modified, or that its indebtedness is greater than was then supposed, or in the event of a partial distribution to the widow or children before the final distribution of the estate.—Estate of Lux, 100 Cal. 593, 604, 35 Pac. 341; Estate of Freud, 131 Cal. 667, 674, 82 Am. St. Rep. 407, 63 Pac. 1080. An order of family allowance granted before the return of the inventory ceases upon such return.—Crew v. Pratt, 119 Cal. 131, 137, 51 Pac. 44. The order of allowance to a widow, where there are no children, terminates at her second marriage, unless there is a further order of the court.—Estate of Hamilton, 66 Cal. 576, 6 Pac. 493; but where there are children, the order may be continued for their benefit.—Estate of Still, 117 Cal. 509, 514, 49 Pac. 463. If an order of family allowance has become final, by the lapse to time in which to appeal therefrom, the probate court or judge has no power, without motion or showing upon notice, to suspend the order.—Estate of Nolan, 145 Cal. 559, 561, 79 Pac. 428. If a family allowance is granted to the widow during general administration, her right thereto is not suspended by reason of removal of the general administrator and the appointment of a special administrator. The right to such allowance continues during special administration.—Estate of Welch, 106 Cal. 427, 432, 39 Pac. 805. But the widow, who is administratrix of the estate, and who has received a family allowance, can not purposely delay the settlement of the estate that she may consume the whole of it by means of her allowance. The policy

of the law is, that the affairs of estates shall be settled and the assets distributed as speedily as possible. The expression, "during the progress of the settlement of the estate," must be construed to mean during the time reasonably necessary for that purpose. If so, the order, though regarded as a judgment, fixing a lien upon the assets of the estate, must be presumed to have been satisfied, when the time shall have arrived at which the estate may be settled; else the administrator may delay action until the whole estate is consumed and nothing be left to those who are entitled to a distributive share in its assets.—*In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, 41. If a family allowance is made before the return of the inventory, it ceases to be operative upon such return.—*Estate of Bell*, 153 Cal. 331, 95 Pac. 372, 377. An order for a family allowance which, in form, simply grants an allowance of a certain sum per month, without any specification of the time during which it shall continue, should be construed as if the provisions of that section as to the time during which it should continue constituted a part of the order. So construed, such an order continues during the progress of the settlement of the estate, unless the estate is insolvent, in which event it continues for only one year after the granting of letters, even though the settlement of the estate has not then been concluded.—*Estate of Treat*, 162 Cal. 250, 121 Pac. 1003. Where the estate is insolvent the family allowance under section 1466, Cal. Code Civ. Proc., must not be for longer than one year after granting of letters.—*Estate of Treat*, 162 Cal. 250, 121 Pac. 1003. The court may, where there has been a change in the circumstances of the estate, or in the relation of the parties, modify an order for family allowance in accordance with the altered conditions, but until such modification has been made, the order retains its force as a judgment.—*Estate of Nelson*, 167 Cal. 321, 139 Pac. 692. Mere delay in demanding the accumulated allowance does not forfeit the right thereto.—*Estate of Nelson*, 167 Cal. 321, 139 Pac. 692. It is not an abuse of discretion under such circumstances to reduce the allowance for the remaining period of administration.—*Estate of Nelson*, 167 Cal. 321, 139 Pac. 692. Where the court retained its power over the order for a widow's allowance by provision "until further order of court," it was within its power and duty on proper showing to reduce or to discontinue the allowance.—*In re Overton's Estate*, 13 Cal. App. 117, 108 Pac. 1021. Questions as to poverty of mother having custody of children held immaterial from standpoint of executrix seeking to reduce allowance made, tending more to justify increase.—*In re Snowball's Estate*, 156 Cal. 235, 104 Pac. 446. Prior to the deciding by the supreme court that a family allowance ceases on the widow's marriage, the fact of such an allowance being kept alive after such an event could not, in itself, be evidence of fraud and conspiracy.—*Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623. After the probate court has ordered an allowance to the widow during pendency of the administration, it is vested with power to modify the provision, on a showing that con-

ditions have changed so as to call for a review of the order.—In re Boselly's Estate, 179 Cal. 218, 176 Pac. 45. The probate court, after making an order granting the widow a specific allowance per month pending the administration, may, by a later order to take effect as from the time of the application therefor, modify the order made.—In re Boselly's Estate, 179 Cal. 218, 176 Pac. 45.

(22) Order. Insolvent estates.—Under section 1466 of the Code of Civil Procedure of California, a family allowance, in the case of an insolvent estate, must not be for longer than one year after the granting of letters testamentary or of administration.—Estate of Treat, 162 Cal. 250, 121 Pac. 1003. Whether or not the estate is insolvent is a question of fact that may be determined, upon an opposition by creditors of the decedent, in a proceeding to enforce the continued payment of the allowance, instituted after the expiration of a year from the granting of letters. Such a proceeding involves no collateral attack upon the original order, but simply an inquiry as to whether the order had, by its terms, ceased to be operative.—Estate of Treat, 162 Cal. 250, 121 Pac. 1003.

(23) Order. Validity.—An order of family allowance is not invalid for lack of a finding that the property exempt from execution, and already set apart for the support of the widow, was insufficient for that purpose. The order for additional allowance, in itself, is a declaration of the insufficiency of the amount originally set apart for the support of the family.—Estate of Welch, 106 Cal. 427, 430, 39 Pac. 805. A temporary order for family allowance, made before the return of the inventory, ceases to be operative when that return is made, notwithstanding such order contains the words "until further order of this court." That phrase does not have the effect of prolonging the life of the order beyond the return of the inventory.—Estate of Bell, 142 Cal. 97, 100, 75 Pac. 679. And it is unjust, after the widow has received \$5700, through the court of another state, to allow her \$500 per month in this state, thirteen years after her husband's death, where the failure to close the estate many years prior to the order for such allowance was due solely to her neglect.—State v. Superior Court, 48 Wash. 141, 92 Pac. 942, 943. The survivor of the community of husband and wife, after the dissolution of the community by death, can not create a charge against the community estate which would be superior to the claims of the creditors of the community, and also to the rights of the deceased spouse's heirs or devisees to a one-half interest in the community property. Hence if a husband marries again, after his wife's death, and then dies himself, an order of allowance to his second wife, making it a charge on the husband's interest in the community property, prior to that of community debts, can not be sustained, because the interest of the deceased wife in the community property would then be subjected to the payment of the community debts to the extent of the depletion of the husband's

Interest therein.—*In re Cannon's Estate*, 18 Wash. 101, 50 Pac. 1021, 1022.

(24) **Order. Finality, conclusiveness.**—A family allowance, made under a valid order of court, becomes final, where no motion has been made to set it aside, and the time for an appeal therefrom has elapsed. It is then conclusive as to the status of the person in whose favor it was made, for all purposes connected with the order and payment of the money thereunder.—*Estate of Nolan*, 145 Cal. 559, 561, 79 Pac. 428. An order granting a family allowance, made after the filing of the inventory, which has become final by the lapse of the time within which an appeal might have been taken therefrom, is conclusive in favor of the right of the widow to receive the amount directed to be paid to her, so long as the order remains in force, and the fact that upon proceedings for partial distribution almost all of the estate has been set over to the persons entitled thereto, and that the widow has come into possession of practically her whole share of the estate, and that she has acquiesced in the discontinuance of the payment of the allowance after such partial distribution for more than two and a half years, does not affect her right to claim such allowance.—*Estate of Nelson*, 167 Cal. 321, 139 Pac. 692.

(25) **Paid without order of court.**—In the matter of paying a family allowance, the executor or administrator is not required to wait for an order of court, but may make the necessary expenditures as the exigencies occur, and the court will allow such sums as may be reasonable in the settlement. If an order is made for an allowance to the widow, it is a determination by the court that she is entitled to a family allowance for the period therein named, and the executors or administrators, having paid the same, are entitled to a credit in the statement of their accounts for the amount thus fixed by the court as a reasonable and proper sum to be paid to the surviving widow for that purpose; and it is error to refuse such credit.—*Estate of Lux*, 100 Cal. 606, 608, 35 Pac. 345; *Estate of Lux*, 114 Cal. 89, 90, 45 Pac. 1028; *Dekum's Estate*, 28 Or. 97, sub nom.; *Dekum v. Dekum*, 41 Pac. 159; *Estate of Fernandez*, 119 Cal. 579, 583, 51 Pac. 851. As the court has power to credit the executors or administrators in their final account with any reasonable sum of money paid out for the family allowance, the question of family allowance becomes adjudicated where no appeal is taken from an order of settlement, and no offset can be claimed to an annuity payable to the widow from the date of the death of the testator on account of payments after the return of the inventory.—*Crew v. Pratt*, 119 Cal. 131, 137, 51 Pac. 44.

(26) **Contest of allowance. Collateral attack.**—After an order for family allowance becomes final and conclusive, it is not subject to collateral attack.—*Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *Estate of Bell*, 131 Cal. 1, 4, 63 Pac. 81, 668; *Estate of Nolan*, 145 Cal. 559, 79 Pac. 428; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38; and



the order is not reviewable in equity.—*Dougherty v. Bartlett*, 100 Cal. 496, 499, 35 Pac. 431. On the settlement of an administrator's accounts, a creditor of the estate can not object to the allowance of a voucher filed by the widow of the deceased for payments alleged to have been made her as a family allowance, on the ground that it had never been received by her.—*Estate of Fisher*, 5 Cal. Unrep. 168, 42 Pac. 237, 238.

(27) *Vacating allowance. Fraud.*—An order for a family allowance may be vacated by the probate court, and it will be presumed that, in setting aside orders approving the time of the allowance, the court duly considered the administrator's claim to protection for making payment under its previous orders; the court undoubtedly has a right to vacate its order of family allowance on the ground of fraud or mistake, and, in the absence of anything in the record to the contrary, it must be assumed, where such an order is set aside, that it was upon one or the other, or both, of these grounds that its jurisdiction was invoked. Although the widow might not have been in court when the vacating order was made, yet she waived any objection by reason of subsequent proceedings in the court from which it appears that she unsuccessfully appealed from the vacating order, and upon the final hearing asked the court to make a new award to her, and, when the estimate was returned by the appraisers, asked to have it approved by the court, which was done.—*Clemes v. Fox*, 25 Colo. 39, 53 Pac. 225, 228, 229. General equitable relief can not be granted in the probate department of the superior court, for the reason that such relief is not within its probate jurisdiction. Sitting as a court of probate, the superior court exercises a special and limited statutory jurisdiction under statutory procedure, and although guided by the principles of equity in the exercise of that jurisdiction, it does not exercise general jurisdiction in equity, but is limited to matters in probate, and in the administration of the estate of decedents, to the objects of such administration. These objects are the temporary preservation and protection of the estate of the deceased, the satisfaction or payment of such debts and claims as are charges or liens upon it, and the distribution of the residue to those who are entitled thereto. Incidentally, the expenses incurred in the administration, and a temporary provision for the support of the family, including a homestead, where proper, are to be taken from the estate. This provision, however, is in reality a distribution of a portion of the estate to those who, by virtue of the statute, are entitled thereto. Under its probate jurisdiction the court can not bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or administrator, or for the purpose of determining their rights to the proceeds of a sale derived under those for whose benefit the sale was ordered. Thus when it appears that the order for family allowance was made to reimburse the widow for moneys which she had already expended in support of her family, and that she had obtained these moneys from the assignors of the plaintiff by mort-

gaging her interest in the estate for security for their repayment, and, without disclosing this fact, had, as executrix, obtained an order for the sale of the entire estate under which the purchaser would take the land discharged of such mortgage, there is presented the precise case in which a court of equity should interfere to control the enforcement of the judgment of another court by directing the application of the proceeds of that sale. The probate court lacks jurisdiction of such a matter, and jurisdiction in equity is therefore properly invoked and exercised.—*Curtis v. Schell*, 129 Cal. 208, 219, 220, 79 Am. St. Rep. 107, 61 Pac. 951; *Savings Bank v. Schell*, 142 Cal. 505, 509, 76 Pac. 250.

(28) *Liens. Contracts to pay out.*—A family allowance, made before exempt property and the homestead are set apart, does not constitute a charge or lien upon the family home.—*Estate of Still*, 117 Cal. 509, 513, 49 Pac. 463. Where a lessor's lien possesses no superiority over that of any other person, it is subject to the right of the widow and the minor children to support from the estate of the decedent.—*In re Stone's Estate*, 14 Utah 205, 46 Pac. 1101, 1102. If an executrix mortgages her interest in the property of the estate to obtain any additional income with which to support the family, and many years afterwards obtains an order for a family allowance, by concealing from the court the fact that the income and borrowed money had been sufficient for the support of the family, or that any money had been borrowed at all for that purpose, and by falsely representing to the court that the moneys received by her had been insufficient, and she obtains an ex parte order, in the matter of the estate, for a family allowance, reaching back many years, and for a large amount, and then files a petition for an order of sale of all the real property for the purpose of paying said allowance, it is clearly a scheme to deprive the mortgagee of his security, by selling the property at probate sale free of the mortgage, and, by means of the direction to pay the family allowance, to appropriate all the proceeds to her own use, and thus defraud the mortgagee of the amount due upon his mortgage. This the court will not allow, and it makes no difference whether the mortgages were executed by the widow herself on her individual interest in the estate, or whether they were made for the benefit of a son upon his interest. The legal effect of the transaction is the same.—*Curtis v. Schell*, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951; *Savings Bank v. Schell*, 142 Cal. 505, 509, 76 Pac. 250.

(29) *Further allowance.*—When the family allowance becomes exhausted, and the estate is solvent, the widow is entitled to such further allowance as is necessary for her maintenance during the progress of the settlement of the estate.—*Estate of Roberts*, 67 Cal. 349, 350, 7 Pac. 733. So where the exempt property is set apart as insufficient for the support of the widow and minor children, the court may make such further allowance; and if the widow dies, an allowance may be made for the benefit of the minor children.—*In re Murphy's Estate*, 30 Wash. 9, 70 Pac. 109. In making such further allowance, it must be pre-

sumed that the court will act with due regard to any previous order made for the widow's support and the subsequent condition of the estate.—*Estate of Slade*, 122 Cal. 434, 438, 55 Pac. 158. Under the statute of North Dakota the county court has power, in its discretion, to make an additional allowance for the maintenance of the family, though such order is one allowing a claim against the estate after the time has expired in which claims may be filed against the estate.—*Tyvand v. McDonnell*, 37 N. D. 251, 164 N. W. 1. A divorced woman, applying for an increase of the allowance made to her by the decree for the support of the children, whose custody was awarded her, must present affidavits showing the increased needs of herself and children and her present condition; also the ability of the father to pay the further amount asked.—*Rindlaub v. Rindlaub*, 28 N. D. 168, 169, 147 N. W. 725. When a family allowance is made, it is not proper to make an additional allowance for a minor child, who is a member of the family and entitled to participate in the allowance already made, unless special circumstances exist, as where the widow as head of the family was not applying the allowance received by her for the benefit of such child.—*In re McSwain's Estate*; *McSwain v. Craycroft*, 176 Cal. 280, 168 Pac. 117, 120.

(30) **Motion for new trial.**—A motion for a new trial is not the proper procedure after a family allowance has been granted. It is the duty of the court, ex parte, and without petition, to make such order, and, there being no provision for the framing of issues with respect to the matter of family allowance, proceedings for a new trial as to such a matter are not authorized.—*Shipman v. Unangst*, 150 Cal. 425, 88 Pac. 1090; *Leach v. Pierce*, 93 Cal. 614, 619, 29 Pac. 235.

(31) **Appeal. Review.**—An order granting an allowance to the widow of an intestate is appealable.—*In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, 40. An appeal from an order denying a family allowance will not be reversed, where the petition for such allowance contains no statement that the proceeds of a homestead consisting of farming-lands were insufficient for the support of the family.—*Estate of Luther*, 67 Cal. 319, 7 Pac. 708. An allowance to the widow is not reviewable after the time has elapsed for an appeal from the order. It then becomes final, and the power of the court over it is at an end. The court below can not sit as an appellate court to review its own orders.—*Estate of Stevens*, 83 Cal. 322, 326, 17 Am. St. Rep. 252, 23 Pac. 379. A wife separated from her husband is not a party "aggrieved" by the action of the court in refusing a family allowance to her, and has no right of appeal.—*Estate of Noah*, 88 Cal. 468, 26 Pac. 361. If a special administrator has been directed, by order of the court, to pay arrearages of family allowance, accruing after the suspension of the general administrator, he may appeal from such order.—*Estate of Welch*, 106 Cal. 427, 429, 39 Pac. 805; and the presumption is, where a special administrator of the estate of the deceased has appealed from an order of the court directing him to pay

to the widow of the deceased a designated sum of money as a family allowance, that the condition of the estate was such as to justify the order.—*Estate of Carriger*, 5 Cal. Unrep. 129, 41 Pac. 700, 701. An appeal from an order requiring an administrator to pay a family allowance stays proceedings upon the order appealed from, where an undertaking or deposit on appeal has been given or made.—*Pennie v. Superior Court*, 89 Cal. 31, 32, 26 Pac. 617. An appeal from such an order operates as a supersedeas, and stays all further proceedings in the court below in the particular matter involved in the order appealed from, but the order or decree is "set at large," and the subject-matter removed from the jurisdiction of the lower court, until the appeal has been determined, and the matter remitted back from the appellate court.—*Ruggles v. Superior Court*, 103 Cal. 125, 128, 37 Pac. 211. Upon an appeal from an order directing the payment of a family allowance, the appellate court will sustain the order, where the only ground alleged is the insufficiency of the evidence.—*Estate of Nolan*, 145 Cal. 559, 561, 79 Pac. 428. Where the amount of the allowance is not so excessive as to constitute an abuse of discretion on the part of the court below, the appellate court will not disturb the order.—*Estate of Bump*, 152 Cal. 274, 92 Pac. 643, 645. Where the showing is sufficient to justify an award to the widow for her allowance, the court will not reverse the order, even though the estate is insolvent.—*Clemes v. Fox*, 25 Colo. 39, 53 Pac. 225, 229. The appellate court will not interfere with the discretion of the lower court in such matters, if not exercised on erroneous principles, except in extreme cases.—*Estate of Lufkin*, 131 Cal. 291, 293, 63 Pac. 469. Where there is no specific provision in the statute as to the contents of the record in such cases, or the mode of authentication, the provisions regulating bills of exceptions, statements, and appeals in ordinary actions must be applied, and, so far as may be, though the proceedings are conducted in a different way, and the records differ in their make-up, the analogies between them must govern. While there is no such thing, technically, as a judgment roll in probate proceedings, the successive determinations in the course of them, whenever the statute directly or by implication declares them final, must be regarded as final judgments, and the portions of the record upon which they are based must, on appeal, be regarded as the record for the particular determination.—*In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, 40. The record must be held to consist of the papers found in the transcript, and, for the purpose of appeal, these papers must be held to constitute the judgment roll. Other matters, not forming part of the judgment roll in such cases, would have to be incorporated in bills of exceptions or statements, as the case might be, following the analogies of provisions regulating records on appeal from judgments in ordinary actions.—*In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38, 40; *Estate of Ryer*, 110 Cal. 556, 42 Pac. 1082. A proposed bill of exceptions, accompanied by general notice to the attorneys, by the

general objectors, that the bill was intended to be used as a bill of exceptions in the matter of the petition by the widow for maintenance, filed by her in the matter of said estate, is one which the widow is entitled to use on the objectors' direct appeal from the order granting her a family allowance.—*Leach v. Pierce*, 93 Cal. 614, 620, 29 Pac. 235. A creditor of an insolvent estate may appeal from an order of family allowance, though it may have been made without notice.—*Estate of Fretwell*, 152 Cal. 573, 93 Pac. 283, 284. An appeal may be taken at any time within sixty days after the order is entered, but the time fixed in which to prepare and serve a bill of exceptions is ten days after notice of the entry of the judgment.—*Leach v. Pierce*, 93 Cal. 614, 623, 29 Pac. 235. Where an application for a family allowance is made under an order which was never entered, a reversal by an appellate court of such order on a former appeal is res judicata.—*Estate of Bell*, 153 Cal. 345, 95 Pac. 378. An executrix is technically a party aggrieved by an order granting a family allowance, and as such has a right to maintain an appeal therefrom.—*Estate of Snowball*, 156 Cal. 235, 104 Pac. 446. Under subdivision 3 of section 963 of the Code of Civil Procedure of California, an appeal is allowed only from an original order granting or refusing to grant a family allowance and an order discontinuing a family allowance granted "until further order of the court" upon the petition of the heirs and devisees under the will of the deceased is not appealable.—*Estate of Overton*, 13 Cal. App. 117, 108 Pac. 1021. Under section 963, subdivision 3, of the Code of Civil Procedure of California, allowing an appeal in probate proceedings from an order "against or in favor of . . . making an allowance for a widow or child," opposing creditors and the administrator of an insolvent estate may appeal from an order directing the payment of a family allowance under such original order therefor, for a period subsequent to one year after the granting of letters.—*Estate of Treat*, 162 Cal. 250, 121 Pac. 1003. In the determination of the question as to the amount of the preliminary allowance to the widow of a deceased person, much is necessarily left to the discretion of the judge to whom the application is made, and his action will not be disturbed on appeal, unless it clearly appears that the discretion has been improperly exercised.—*In re Cowell's Estate*, 164 Cal. 636, 130 Pac. 209. In fixing an allowance for the widow out of the deceased husband's estate the court has a wide discretion which, unless plainly abused, will be sustained on appeal.—*Estate of Cowell*, 170 Cal. 362, 149 Pac. 808. After an executor has appealed from a family allowance to the widow, his expressed ground being that she had deserted her husband, he can not raise, for the first time on appeal, the point of laches in applying for the allowance.—*Estate of Beason*, 49 Utah 24, 27, 161 Pac. 678. As to a widow's title to a family allowance, the same being contested by the administrator on the ground that she had deserted her husband, the court considered the

testimony and determined therefrom that there had been no desertion.—*Estate of Beason*, 49 Utah 24, 161 Pac. 678.

## 2. Assignment of estate of limited value.

(1) *In general.*—When it appears, both from the petition for letters of administration and the return of the inventory and appraisement, that the entire property of the estate is of less value than \$1500, the widow, if there are no children, is entitled to have the whole estate set apart to her without any further proceedings in the administration; and no notice to creditors is necessary, though an order to show cause is necessary, under the statute.—*Estate of Atwood*, 127 Cal. 427, 430, 59 Pac. 770. And the widow is entitled thereto in case of an invalid second marriage.—*Estate of Richards*, 133 Cal. 524, 528, 65 Pac. 1034. The court, however, in setting apart the whole estate to the widow and minor children, where it is of less value than \$1500, has no power to order any sale of the property of the deceased. The statute merely provides that the whole estate shall be set apart for the widow and children, subject only to the expenses of the last sickness, administration, etc. If there is to be any sale of the real property of the estate to pay such expenses, such sale must be conducted under the provisions of the statute relating to the sale of real property of a decedent, where alone the power to make and the method of such sale are to be found. The court has no jurisdiction to dispense with the regular proceedings required in the case of the sale of the real property of the decedent because of the fact that the estate is of less value than \$1500.—*Wills v. Pauly*, 116 Cal. 575, 581, 48 Pac. 709. In such cases the expenses of administration, burial, and last sickness are to be paid before such estate is set apart to the widow, or to the widow and children.—*In re Thorn's Estate*, 24 Utah 209, 67 Pac. 22. In Utah, the widow does not become the absolute owner of such property, to the exclusion of the heirs and members of the family.—*Rands v. Brain*, 5 Utah 197, 14 Pac. 129, 130, 5 Utah 272, 15 Pac. 1. The statute concerning proceedings to be taken when the estate does not exceed a limited value was intended to include the whole estate.—*Scott v. Stark*, 75 Wash. 610, 615, 135 Pac. 643. The presumption declared by section 164 of the Civil Code of California that a conveyance to a husband and wife creates a tenancy in common, is not conclusive in favor of such contestants. It is therefore competent for the widow to testify that such property is community and that she declared a homestead thereon.—*Estate of Shirey*, 167 Cal. 193, 138 Pac. 994.

(2) *Notice to creditors, and to show cause.*—The whole estate of a decedent, where it is less than \$1500 in value, may be set apart to the widow, or to the widow and children, without notice to creditors.—*Estate of Palomares*, 63 Cal. 402; *Estate of Atwood*, 127 Cal. 427, 59 Pac. 770. And notice of the order to appear and show cause why the whole of the estate should not be assigned to the widow, or to the

widow and children, need not be given by publication, because the statute does not require it, and because the judge, on final hearing, if he deems the notice insufficient, may order such further notice as may seem to him proper.—*Wills v. Booth*, 6 Cal. App. 197, 91 Pac. 759, 760.

(3) What property may be set apart.—It was clearly the intention of the legislature that estates under \$1500 in value should go immediately to the family, without further administration, and the entire estate of the decedent is included. The fact that a part of the estate was separate property of the deceased, and that before his death the widow had filed a homestead declaration thereon, he not joining therein, does not take the property out of the operation of the statute. The court, in making the order, is not setting aside a homestead nor dealing with the subject of homesteads.—*Estate of Neff*, 139 Cal. 71, 72, 72 Pac. 632. The statute covers all property, where the estate does not exceed \$1500 in value, whether the property be community or separate.—*Estate of Leslie*, 118 Cal. 72, 73, 50 Pac. 29.

(4) Widow is not entitled to, when.—The fact that a wife voluntarily left her husband within one week after their marriage and about two years prior to his death, without any agreement as to property rights, and during such interval had no communication with him, if it did not constitute an abandonment of him, at least relieved him from liability for her support. Under such circumstances she was not a member of his family at the time of his death, and was not entitled under section 1469 of the Code of Civil Procedure of California to have his estate of less value than \$1500 set aside to her.—*Estate of Bose*, 158 Cal. 428, 111 Pac. 258.

(5) Apportionment, and rights of children.—Section 1469 of the Code of Civil Procedure of California does not expressly state to whom the estate shall be assigned, but simply that it shall be assigned for the use and support of the widow and minor children. The preceding section, however, which is in the same chapter, provides that "when property is set apart to the use of the family under the provision of this chapter, if the decedent left also a minor child or children, the one half of such property shall belong to the widow or surviving husband, and the remainder [shall go] to the child, or in equal shares to the children, if there be more than one." In the absence of special provision in said section 1469, the preceding section must control. The children, therefore, are entitled, as tenants in common, to an undivided one-half of the property set apart to the widow and minor children, and they may recover the demanded premises in an action of ejectment.—*McGuire v. Lynch*, 126 Cal. 576, 578, 59 Pac. 27.

(6) Liens, outstanding titles, etc.—The setting apart of property for the support of the family, where the estate is less than \$1500 in value, does not divest existing liens against the property.—*Fairbanks v. Robinson*, 64 Cal. 250, 251, 30 Pac. 812. The order of the court sets apart only the title and interest of the deceased. It can do no more.

It is not the purpose of the statute to have the court examine the title and set apart such property on condition that the title is perfect. It is evident that the court can not affect the outstanding title in the hands of a third person.—*Estate of Richards*, 133 Cal. 524, 528, 65 Pac. 1034. Where a lessor's lien is gone, his claim possesses no superiority to that of any other person, and is inferior to that of the widow and the minor children.—*In re Stone's Estate*, 14 Utah 205, 46 Pac. 1101, 1102. In the case of a valid mortgage lien, however, upon a probate homestead set apart for the use of the family, it was not intended that the creditor should lose his debt for not doing an impossible act by presenting his claim, because no notice to creditors can be given and no claims presented for allowance in such a case, and no presentation of the mortgage claim is necessary.—*Browne v. Sweet*, 127 Cal. 332, 335, 59 Pac. 774. Where a deceased husband's estate is found, upon the return of the inventory, to be of less value than \$1500, and the probate court thereafter duly and regularly makes an order and decree setting the entire estate aside for the use and support of the family of the deceased, in compliance with the statute, and the widow thereafter mortgages all her interest in and to such estate, the mortgage so executed covers whatever right, title, or interest she has in or to the estate by right of succession as an heir of her deceased husband, and the interest so granted and encumbered is commensurate only with her rights of succession, and a purchaser under foreclosure sale can acquire only such rights and privileges as she has by reason of being an heir to such estate.—*Booth Mer. Co. v. Murphy*, 14 Ida. 212, 93 Pac. 777.

(7) *Passing and vesting of estate.*—Where the owner of an estate situated in Indian Territory, of less value in the aggregate than \$300, died in Indian Territory prior to statehood, an order of the United States court, exercising its probate jurisdiction, vesting the entire estate in the widow of deceased, was valid, and passed and vested in the widow all of such estate, both real and personal, under section 3, chapter 1 of *Mansfield's Digest of the Law of Arkansas*.—*Perryman v. Woodward*, 37 Okla. 792, 133 Pac. 244.

(8) *Sale and mortgage of estate.*—Where the whole estate was set aside to the widow on the ground that it was of less value than \$1000, under section 1464 of the statute of the state of Washington, there is no limitation upon the widow's right to sell the same as she pleases.—*Scott v. Stark (Watson)*, 75 Wash. 610, 135 Pac. 643, 645. An order of the court, under the statute of Washington, setting aside "the whole estate" to the widow, vests title in her; that statute does not assume to put a limitation upon the power of sale and, in the absence of legislation, the court can not do so.—*Scott v. Stark (Watson)*, 75 Wash. 610, 616, 135 Pac. 643. Where a deceased husband's estate, of value less than \$1500, was set apart for the use of the widow and children, and the widow afterwards mortgaged all of her interest in the property,



such alienation or incumbrance is good as to her interest, but is subject to the superior and paramount right conferred by the decree of the probate court; such mortgage can not, in any way, interfere with the rights of the family to occupy said property as a home.—*Booth Mer. Co. v. Murphy*, 14 Ida. 212, 222, 93 Pac. 777.

(9) *Appeal*.—If a widow, who is also the administratrix of the estate, makes application to have the whole of the estate of the deceased set apart to her on the ground that it does not exceed in value \$1500, but the application is denied, and an appeal is taken by the widow, it will be dismissed, where she gave no bond on appeal. The order is against the widow, and in favor of the estate; and the widow, individually, is alone aggrieved, and she alone can appeal, but the appeal will not stand unless an undertaking on appeal was filed; and if the appeal was taken in her representative capacity, it must be dismissed, because she has no right to appeal in that capacity.—*Estate of Wood*, 143 Cal. 522, 524, 77 Pac. 481. No notice of the application for a family allowance is required. The court may make the order on its own motion. But any person interested, whether he has had actual notice of the entry of the order or not, may appeal at any time within sixty days. Those who have had only constructive notice certainly should have a reasonable time within which to prepare and serve their bills of exceptions. What is a reasonable time is a question to be determined by the judge, upon all the facts and circumstances. As to those who have been parties to the contest, they are, following the analogies found in provisions of the code relating to civil actions, entitled to actual notice of the entry of the order; and the time within which to move for a new trial, when proceedings therefor are proper, or to prepare and serve a bill of exceptions to be used on appeal from the order, does not begin to run until such notice has been given.—*Leach v. Pierce*, 93 Cal. 614, 621, 29 Pac. 235. Upon an application by a widow to have the estate of her husband set aside to her as not exceeding \$1500 in value, the ultimate fact for the court to determine is the value of the estate; and if heirs of the husband contest her application on the ground that the husband and wife were tenants in common in certain property which has not been appraised, and that the estate is of greater value than \$1500, but the court finds the value to be less than \$1500 and sets aside the entire estate to the widow, its order will not be disturbed, upon appeal taken upon the judgment-roll alone, for failure to find as to the alleged tenancy in common.—*Estate of Shirey*, 167 Cal. 193, 138 Pac. 994. The findings, upon an application by a widow to have the estate of her husband set aside to her as not exceeding \$1500 in value, must be presumed to speak the truth, and the insufficiency of the evidence to support them may not be reviewed in the absence of a bill of exceptions.—*Estate of Shirey*, 167 Cal. 193, 138 Pac. 994. Omitting to find on any issue in such case will be presumed, in the absence of a contrary showing, to result from the failure

to offer any evidence in support of such issue.—Estate of Shirey, 167 Cal. 193, 138 Pac. 994.

(10) Death pending appeal. Abatement.—The power of the court to set apart the whole of an estate without administration, for the use and support of the widow and minor children, can not be exercised, where there is no widow or minor children, and the estate is therefore subject to administration. Hence, where the court has denied the widow's application to have the whole estate set apart to her, there being no minor child, and she dies pending her appeal from such order, she is the only person for whose use and support the estate could be set apart, and by her death the court loses jurisdiction to make such an order. Her death, pending the appeal from an order refusing to grant her application, has the same effect upon the power of the court as if she had died before the application had been heard. This right of the widow does not survive to any one, and the proceedings, therefore, abate by her death.—Estate of Bachelder, 123 Cal. 466, 467, 56 Pac. 97. No action on the note of a decedent can be maintained against his administratrix, where the value of the estate left by him is less than \$1500.—Wills v. Booth, 6 Cal. App. 197, 91 Pac. 759, 760, 761.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 872.

Idaho—Compiled Statutes of 1919, section 7571.

Montana—Revised Codes of 1907, section 7515.

North Dakota—Compiled Laws of 1913, section 8723.

Oklahoma—Revised Laws of 1910, section 6330.

South Dakota—Compiled Laws of 1913, volume II, pages 491, 491a, section 5781.

Washington—Laws of 1917, chapter 156, page 671, section 104.

Wyoming—Compiled Statutes of 1910, section 5610.

**§ 412. Selected and recorded homestead set off to person entitled, subsisting liens to be paid by solvent estate.**

If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the superior court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens or encumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds.

**INADEQUACY OF FUNDS.**—If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment; provided, that it shall be the duty of any executor or administrator, within sixty days after the first publication of notice to creditors, to notify in writing the record holder of any such lien or encumbrance upon real property subject to a declaration of homestead of the death of the testator or intestate, and unless so notified, the rights of the holder of such

lien or encumbrance shall not be affected by his failure to present such claim as hereinabove required.—*Kerr's Cyc. Code Civ. Proc.*, § 1475.

#### ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 873.

Idaho—Compiled Statutes of 1919, section 7572.

Montana—Revised Codes of 1907, section 7516.

North Dakota—Compiled Laws of 1913, section 8724.

Wyoming—Compiled Statutes of 1910, section 5611; Laws of 1915, chapter 104, page 125.

#### § 413. Carving out or sale of homestead as dependent upon division of premises. Report.

If the homestead, as selected and recorded, be returned in the inventory appraised at more than five thousand dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling-house, as will amount in value to the sum of five thousand dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five thousand dollars, and that they can not be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto.—*Kerr's Cyc. Code Civ. Proc.*, § 1476.

## ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona—Revised Statutes of 1913, paragraph 874.

Idaho—Compiled Statutes of 1919, section 7573.

Montana—Revised Codes of 1907, section 7517.

North Dakota—Compiled Laws of 1913, sections 8724, 8726.

Wyoming—Compiled Statutes of 1910, section 5612.

**§ 414. Report of appraiser. Majority and minority, which may be confirmed.**

Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.—*Kerr's Cyc. Code Civ. Proc.*, § 1477.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 875.

Idaho\*—Compiled Statutes of 1919, section 7574.

Montana\*—Revised Codes of 1907, section 7518.

Wyoming\*—Compiled Statutes of 1910, section 5613.

**§ 415. Day to be set for confirming or rejecting report of appraisers.**

When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time, and in such manner, as the court may direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report, as upon the first report.—*Kerr's Cyc. Code Civ. Proc.*, § 1478.

## ANALOGOUS AND IDENTICAL STATUTES.

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 876.

Idaho\*—Compiled Statutes of 1919, section 7575.

Montana\*—Revised Codes of 1907, section 7519.

North Dakota—Compiled Laws of 1913, section 8726.

Wyoming\*—Compiled Statutes of 1910, section 5614.

**§ 416. Form. Order setting time for hearing report of appraisers and prescribing notice. Value exceeding five thousand dollars.**

[Title of court.]

[Title of estate.]

{ No. ——. <sup>1</sup> Dept. No. ——.   
 [Title of form.]

The appraisers appointed by the court to appraise the estate of said deceased having filed their return appraising the homestead selected and recorded in the lifetime of the deceased at more than five thousand dollars (\$5,000) at the time the same was selected, and setting apart a portion thereof as a homestead,<sup>2</sup>—

It is ordered, That —, the — day of —, 19—, be fixed as the day for hearing any objections thereto, and that the clerk give notice of said hearing by posting notices thereof not less than ten days <sup>3</sup> prior to said date, in three public places in the county <sup>4</sup> of —, state of —.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, making return that the premises can not be divided without material injury. <sup>3</sup> Or as otherwise prescribed by statute. <sup>4</sup> Or, city and county.

**§ 417. Form. Notice of hearing on report of appraisers as to homestead.**

[Title of court.]

[Title of proceeding.]

{ No. ——. <sup>1</sup> Dept. No. ——.   
 [Title of form.]

Notice is hereby given, That the appraisers appointed to appraise the estate of the above-named deceased have filed herein their return and report appraising the homestead selected and recorded during the lifetime of said

decedent at more than five thousand dollars (\$5,000) at the time it was selected, and setting off a portion thereof as a homestead; and that the hearing of the same has been fixed by the court for —, <sup>2</sup> the — day of —, 19—, at — o'clock in the forenoon <sup>3</sup> of said day, at the court-room of said court, at which time and place any person interested in the estate may appear and present his objections thereto.

Dated —, 19—.

—, Clerk.

By —, Deputy Clerk.

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Day of the week. <sup>3</sup> Or, afternoon.

**§ 418. Form. Order setting apart homestead out of property worth more than five thousand dollars when selected.**

[Title of court.]

[Title of estate.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

It appearing to the satisfaction of the court that due and legal notice has been given by the clerk, for the time and in the manner as directed by the court, of the report of the appraisers herein, appraising the value of the homestead of said decedent, at the time of its selection in his lifetime, at more than five thousand dollars (\$5,000), and admeasuring and setting apart a portion thereof as a homestead, and the widow of said deceased having filed her objections thereto, and the said hearing having been regularly postponed to this time, and the court having heard the said matter and confirmed said report in all things,—

It is therefore ordered, adjudged, and decreed, That said report be in all things confirmed, and that the land so admeasured be, and the same is hereby, set apart as a homestead for the use of —, the said widow, and that the same was and is community property, and is hereby vested absolutely in the widow.<sup>2</sup>

Said portion so set apart is described as follows, to wit:

\_\_\_\_\_,<sup>3</sup> \_\_\_\_\_, County Clerk.  
Entered \_\_\_\_\_, 19\_\_\_\_.<sup>4</sup> By \_\_\_\_\_, Deputy.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, that the same was separate property; that said deceased did not join in the selection thereof; and that the same is set apart as a homestead for the period of \_\_\_\_\_ years only from the date hereof, for the use of the said widow, and \_\_\_\_\_ and \_\_\_\_\_, the minor children of said deceased. Compare *Weinreich v. Hensley*, 121 Cal. 647, 655, 54 Pac. 254. <sup>3</sup> Give description. <sup>4</sup> Orders and decrees need not be signed: See § 77, ante.

**§ 419. Costs, to whom chargeable. Persons succeeding to rights of homestead owners. Powers and rights of.**

The costs of all proceedings in the superior court provided for in this chapter, must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire.—*Kerr's Cyc. Code Civ. Proc.*, § 1485.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 877.

Idaho\*—Compiled Statutes of 1919, section 7576.

Montana\*—Revised Codes of 1907, section 7520.

Wyoming\*—Compiled Statutes of 1910, section 5615.

**§ 420. Certified copies of certain orders to be recorded.**

A certified copy of every final order made in pursuance of this article, by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated.—*Kerr's Cyc. Code Civ. Proc.*, § 1486.

**ANALOGOUS AND IDENTICAL STATUTES.**

The \* indicates identity.

Arizona\*—Revised Statutes of 1913, paragraph 878.

Idaho\*—Compiled Statutes of 1919, section 7577.

Montana\*—Revised Codes of 1907, section 7521.



## HOMESTEADS.

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## I. ANTEMORTEM HOMESTEADS.

1. In general.—The right of testamentary disposition is subordinate to the rights of the family. Thus, despite the fact that a farm has been specifically devised, one-half to the widow and the other half to the children, it is competent for the probate court to set it aside as a homestead, for the right of a testator to devise is subordinate to the power of the probate court to sequester and set apart the property for the shelter, care, and support of the family.—*Estate of Huelsman*, 127 Cal. 275, 276, 59 Pac. 776. A homestead out of the separate property of a deceased husband can be set apart to the widow only for a limited time, and certainly not longer than during her life.—*Hutchinson v. McNally*, 85 Cal. 619, 621, 24 Pac. 1071. An overruled opposition to the setting apart of a homestead does not estop the party objecting from establishing his title, in an action for that purpose.—*Dickey v. Gibson*, 121 Cal. 276, 278, 53 Pac. 704. The primary purpose of the homestead right is to preserve a home for the protection of the family.—*Hannon v. Southern Pacific Ry. Co.*, 12 Cal. App. 350, 107 Pac. 335. The right to the homestead is purely the creation of statute, and such right may be modified at the will of the legislature.—*Hannon v. Southern Pac. Ry. Co.*, 12 Cal. App. 350, 107 Pac. 335. Homestead and exemption laws are in subservience to the interest that the public has in the maintenance and protection of the home of the individual citizen.—*Wentworth v. McDonald*, 78 Wash. 546, 139 Pac. 503, 504. Under the laws of Oklahoma, the homestead of a family may consist of more than one tract of land, and may be owned by either the husband or the wife, or by both jointly, or one tract may be owned by one and the other tract owned by the other, so long as the aggregate number of acres occupied as a home does not exceed 160.—*Gooch v. Gooch*, 38 Okla. 300, 47 L. R. A. (N. S.) 480, 133 Pac. 242. One who holds possession of land under an executory contract of purchase may declare a valid homestead therein.—*Brooks v. Black*, 22 Colo. App. 49, 123 Pac. 133. The right of homestead did not exist at common law and is one of statutory origin.—*In re Cook's Estate*, 34 Nev. 217, 117 Pac. 29. The rule of liberal construction is extended to homestead laws, and in every permissible case where there is a bona fide home of the parties, it should be held that the business conducted within the premises is not the paramount and principal purpose, but the incidental and subordinate purpose; that the home is the main thing and not the business; that the business is conducted to enable the parties to maintain the home, and not that the parties are incidentally inhabiting the premises for the purpose of maintaining the business.—*McKay v. Gesford*, 163 Cal. 243, Ann. Cas. 1913E, 1253, 41 L. R. A. (N. S.) 303, 124 Pac. 1016. The homestead is something distinct from the legal title. It qualifies and limits the right of the owner of the title for the benefit and protection of both spouses while living, and to insure future protection to the survivor.—*Wall v. Brown*, 162 Cal. 307, 122 Pac. 478.

## REFERENCES.

As to the general policy of the Homestead Law.—See note 133 Am. St. Rep. 336.

2. Definition of "homestead."—The homestead, and the tests by which it is ascertained, are the same, whether the question arises between those claiming the homestead, or one of them and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife. There is not one homestead as against a creditor, and a different one when the survivor asserts his or her claim as against the heirs of the deceased.—Estate of Delaney, 37 Cal. 176, 180. The word "homestead" signifies the place of the home; the residence of the family. It represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including the outplaces of every kind necessary and convenient for the family use, and land used for the purposes thereof. It is in this sense that the word is used in the constitution, and also in the statute. In other words, it is the actual homestead to which they refer, and to which they purport to add certain legal incidents.—Keyes v. Cyrus, 100 Cal. 322, 324, 38 Am. St. Rep. 296, 34 Pac. 722; Estate of Garrity, 108 Cal. 463, 468, 38 Pac. 628, 41 Pac. 485. The purpose of the homestead law is to secure a home to those clothed with a homestead right,—to each and all of them.—Moore v. Hoffman, 125 Cal. 90, 92, 73 Am. St. Rep. 27, 57 Pac. 769. The purpose of a homestead is to secure a home to each and all those clothed with a homestead right—to each and all of them; and the power of a stranger to enter into possession of the land, and, as a tenant in common to interfere with its occupancy and control by the homestead claimants and have it partitioned, or sold, if division be impracticable, would be inconsistent with the very nature of a homestead and violative of the very purpose for which a homestead is created.—Mills v. Stump, 20 Cal. App. 84, 128 Pac. 349, 350. The homestead interest in land is the offspring of statute, created for the humane and benevolent purpose of furnishing what its designation indicates—a home for the persons for whom the law awards it; and in its enjoyment it is by law made a sanctuary against execution creditors, and should be against every other form of hostile attack.—Mills v. Stump, 20 Cal. App. 84, 128 Pac. 349, 350. The term "homestead" is not a designation of a particular estate, implying some prohibitions and limitations not incident to ordinary titles; but the term only means "the home place," or "the house and adjoining grounds where the head of the family dwells."—Mansfield v. Hill, 56 Or. 400, 108 Pac. 1008.

Property subject to, and ownership.—Under section 1 of article 12 of the constitution of the state of Oklahoma, and section 3246, Compiled Laws of Oklahoma of 1909, the homestead of a family, not in a city, town, or village, may consist of 160 acres of land and may be owned by either husband or wife, or by both jointly.—Alton Mercantile Co. v. Spindel, 42 Okla. 210, 140 Pac. 1168. Where the premises in

Wyoming occupied as a homestead are of greater value than \$1500, the homestead consists of such portion of the premises including the dwelling house, as amounts in value to the sum of \$1500.—*Jones v. Losekamp*, 19 Wyo. 83, 114 Pac. 676. A homestead under the laws of Wyoming consists of a house and lot or lots in any town or city, or of a farm consisting of any number of acres not exceeding 160 acres, so that the value does not exceed \$1500.—*Jones v. Losekamp*, 19 Wyo. 83, 114 Pac. 676. Real estate left by will to the testator's widow for life, and after her death to a son, on his paying the other children \$500, may be, by the son, declared upon as a homestead during his mother's lifetime, he living thereon and paying rent to her as lessee, and having the right of possession; the son took a present vested fee title, subject to the life tenant's rights; if she had not been in possession for more than twenty years, the son had the right of possession.—*Grattan v. Trego* (Kan.), 225 Fed. 705, 709, 140 C. C. A. 579. Hotel property may be properly claimed as homestead.—*Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266. Where a homestead was declared on certain described property, together with the water rights appurtenant thereto, consisting of shares of stock in a water company, it was held that not only the property itself, but also the stock and the water represented thereby, became impressed with the homestead.—*Swan v. Walden*, 19 Cal. App. 128, 124 Pac. 857. Under the laws of the state of Washington the homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated selected as provided by law, which provision is that homesteads may be selected and claimed in lands and tenements with the improvements thereon not exceeding in value the sum of \$2000. The premises thus included in the homestead must be actually intended and used for a home for the claimants and shall not be devoted exclusively to any other purpose. A dwelling house built on one lot and a garden on another separated from the first by an alley way together constituted a homestead within the law.—*Morse v. Morris*, 57 Wash. 43, 135 Am. St. Rep. 968, 106 Pac. 469.

—land held in cotenancy.—Where land is held in cotenancy by a husband and his wife, he holding an undivided half interest as community property, and she the other half as her separate property, and both being in actual occupation thereof, neither he nor she jointly or severally could make, in the lifetime of the husband, a valid declaration of homestead upon his undivided interest in the cotenancy property, so as to affect that interest alone with the homestead characteristics, separate and distinct from the undivided interest of the wife therein.—*Estate of Davidson*, 159 Cal. 98, 115 Pac. 49. The rule that a homestead can not be selected or claimed on lands owned by the claimant as tenant in common or joint tenant does not apply where the joint or common tenancy is that of husband and wife.—*Sewell v. Price*, 164 Cal. 265, 128 Pac. 407, 409. The present law as to homesteads has, under the decisions, operated to the repeal of the act of 1868,

with the result that property held in common or joint tenancy can not be declared upon as a homestead unless the joint holders be husband and wife.—*Furman v. Brewer* (Cal. App.), 177 Pac. 495. Land held by husband and wife may be impressed with homestead at instance of wife.—*Swan v. Walden*, 156 Cal. 195, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, 103 Pac. 931.

**Occupancy and residence.**—The homestead character of real estate depends on family occupancy—not on the source of title.—*Postlethwaite v. Edson*, 102 Kan. 104, 111, L. R. A. 1918D, 983, 171 Pac. 769. The homestead character is possible of having been impressed upon land during the lifetime of the owner, notwithstanding that the latter died without having occupied it as a homestead.—*Belt v. Bush* (Okla.), 176 Pac. 935. The statute that relates to the setting aside for the surviving wife or husband, or minor children, all property of the testator or intestate that would be exempt from execution if he were living, including all property absolutely exempt, and other property selected by the person or persons entitled thereto to the value of \$1500, is one of exemption, and not of inheritance; hence, a person to avail himself of the benefits thereof must bring himself within the letter or spirit of the exemption laws as to residence in the state; or, at least, the circumstances must show an intent and desire to establish and to have such residence within the state.—*Krumenacker v. Andis*, 38 N. D. 500, 165 N. W. 524.

**Declaration and recording.**—The statute of the state of Washington, Rem. 1915 Code, section 528, defines a homestead as the dwelling house in which the claimant resides and the land on which it is situated, selected under the provisions of the Homestead Law, section 529 of that code, exempting homesteads not exceeding \$1000 in value, selected at any time before sale. Section 552 permits homesteads to be selected on land, and provides that the premises must be maintained and actually used for a homestead by the claimant, and section 559 requires the declaration to contain a statement showing that it is made by the head of a family or, when made by a wife, that her husband has not made such declaration, and that she makes the declaration for their joint benefit; a statement of residence on goes only to the manner and not to the time of selection, and hence when the homestead is once jointly selected, they do not control section 535, allowing an abandonment only by declaration thereof, so that a removal without such declaration does not destroy the exemptive character of a homestead.—*Wentworth v. McDonald*, 78 Wash. 546, 139 Pac. 503, 504. Under the laws of the state of Washington a homestead can be selected only by the execution and filing of a homestead declaration and the premises constitute a homestead only from and after the time the declaration is filed for record. No homestead right can be acquired by occupancy only.—*Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 154. Where a portion of the premises covered by a homestead declared upon

community property is partly in one county and partly in another, and the declaration thereof is recorded in only one of said counties, the said declaration is not void because not recorded in the other county, but the same would at most be invalid as to the portion of said homestead lying in the county wherein the declaration had not been recorded.—*Votypka v. Valentine* (Cal. App.), 182 Pac. 76, 77.

7. **What will not invalidate.**—A homestead, selected as such by parties entitled under the law to do so, is not invalidated by the fact that by mistake a small part of some other person's land has been included in the selection.—*Belt v. Bush* (Okla.), 176 Pac. 935, 937. A homestead declared by a married woman on her separate property for the benefit of herself and husband is not invalidated by the fact that at the time of the declaration, for the purpose of maintaining a home for themselves, she conducted a hotel and boarding house in a small dwelling situated on the property, which then was and continued to be their sole and bona fide residence.—*McKay v. Gesford*, 163 Cal. 243, Ann. Cas. 1913E, 1253, 41 L. R. A. (N. S.) 303, 124 Pac. 1016. The fact that the spouses did not permanently occupy one or more rooms in such building, but shifted themselves about as the exigencies of their business demanded, did not warrant a determination that the building was not their place of residence.—*McKay v. Gesford*, 163 Cal. 243, Ann. Cas. 1913E, 1253, 41 L. R. A. (N. S.) 303, 124 Pac. 1016. Though a deed from husband to wife, on the record of which she made a homestead entry, was fraudulent as to creditors, it will not avoid the validity of the homestead entry.—*Brooks v. Black*, 22 Colo. App. 49, 123 Pac. 133. The fact that one has voted in another state or territory does not conclusively establish the loss of a homestead right, which depends upon a residence in the state of Kansas.—*Osage Mercantile Co. v. Blanc*, 79 Kan. 356, 99 Pac. 601.

8. **Application of statute.**—The devolution of title to the homestead of one of the spouses is provided for in section 1265 of the Civil Code of California, and also in section 1474 of the Code of Civil Procedure of that state. The latter section was amended ten days later than the section of the Civil Code, and is to be regarded as the latest expression of the legislative will. By said section 1474 the legislature has declared that "if the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent." The power thus to limit the estate of the heirs is not given by said section 1474, but is merely referred to as the source of the limitation which may be placed upon the estate. The said section 1474 purports to deal merely with the descent of the property from which the homestead was selected, but the power of the court to assign the homestead, and upon whose exercise a limitation upon the estate of heirs is created, is given in

section 1465 of the Code of Civil Procedure of that state, and the provisions of the section last named are to be read in connection with the provisions of section 1474.—*Weinreich v. Hensley*, 121 Cal. 647, 653, 54 Pac. 254; *Estate of Fath*, 132 Cal. 609, 611, 64 Pac. 995. The power thus given to the court, by said section 1465, to set apart a homestead that has been selected from the separate estate of the decedent is the same as its power to set apart a homestead when none has been selected in the lifetime of the decedent, and must be exercised in the same manner and under the same limitations and conditions. The provision in section 1474 making the estate of the heirs subject to the exercise by the court of its power to assign the homestead to the family for a limited period does not confer upon the court the power to assign the homestead taken from the separate property of the decedent, unless by the conditions of section 1465 the separate estate may be so set apart. Section 1465 does not direct the court to set apart the homestead which had been selected by the survivor out of the separate property of the deceased spouse, but declares, in such case, that the court "must select," designate, and set apart a homestead, and limits the property out of which it is to be selected to the common property, if there be any. It is only in the case where there is no common property that it may select, designate, and set apart a homestead out of the separate estate of the decedent. It is very evident that if there be any common property, the homestead which may have been selected by the survivor from the separate property of the decedent, without his assent, would cease to be such upon his death; but the effect of his death upon the homestead selected from his separate estate, without his assent, is the same, whether there be common property or not.—*Weinreich v. Hensley*, 121 Cal. 647, 654, 54 Pac. 252. Section 1468 of the Code of Civil Procedure of California, as amended in 1881, applies to probate homesteads selected and set apart by the court; and such amendment was intended to change the rule declared in *Mawson v. Mawson*, 50 Cal. 539, 543, and to take from the court the power to set apart a homestead selected from the separate property of the deceased, except for a limited period.—*Estate of Schmidt*, 94 Cal. 334, 339, 29 Pac. 714. The provision in section 1468, declaring what shall be the ownership "when property is set apart to the use of the family in accordance with the provisions of this chapter" implies that, until it is so set apart, the property belongs to the estate of the decedent; and the subsequent provision in the same section, that "if the property set apart be a homestead selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased and subject to such order," clearly indicates that the court must make an order designating the limited period for which the homestead is set apart, and that until such order is made there is no homestead, and that the property selected as a homestead out of the separate estate of the deceased in his lifetime, without his assent,

ceases upon his death to be a homestead, and vests in his heirs, free from any such limitation, unless it is afterwards selected and set apart as a homestead by an order of the court.—*Weinreich v. Hensley*, 121 Cal. 647, 655, 54 Pac. 254. Under the rule of liberal construction applicable to homestead laws, in every permissible case where the premises are the bona fide home of the parties, it should be held that the business conducted within the premises is the incidental and not the paramount purpose, and is conducted for the paramount purpose of enabling the parties to maintain a home.—*McKay v. Gesford*, 163 Cal. 243, Ann. Cas. 1913E, 1253, 41 L. R. A. (N. S.) 303, 124 Pac. 1016. A homestead is not a new or additional title to the land, but merely the establishment of certain privileges or immunities therein.—*Smith v. Bangham*, 156 Cal. 359, 28 L. R. A. (N. S.) 522, 104 Pac. 689.

## REFERENCES.

Construction of federal statute exempting land acquired as a homestead from liability for debts contracted prior to issuance of patent.—See note Ann. Cas. 1912D, 382.

9. *Survivorship*.—Under the provisions of the codes of California, it is only a homestead selected from the community property during the existence of the community to which the law of title by survivorship applies.—*Estate of Gilmore*, 81 Cal. 240, 243, 22 Pac. 655. If community property has been designated as a homestead, it becomes, upon the death of one of the spouses, the sole property of the survivor, who will be protected in the same manner as he was before.—*Sanders v. Russell*, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. 852. The homestead character of property is not affected by the death of the husband, but continues so long as it remains a homestead.—*Estate of Fath*, 132 Cal. 609, 612, 64 Pac. 995. Where a homestead was the separate property of the husband, the wife has no right of survivorship in the property, but, on his death, it will be vested in his heirs, discharged of all claim or interest on her part by virtue of any previous declaration of homestead she may have made thereon.—*Warner v. Warner*, 144 Cal. 615, 618, 78 Pac. 24. Upon the death of either spouse, the decedent's homestead rights inure to the survivor.—*Hannon v. Southern Pac. R. Co.*, 12 Cal. App. 350, 107 Pac. 335; *Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312. The devolution of a homestead by the death of a spouse, under section 1474 of the Code of Civil Procedure of California, can only apply when the relation of spouse exists at the date of the death, and can not apply when the relation of spouses has been severed by divorce, and the death of a divorced husband can confer no right of devolution upon the divorced wife under that section of the code.—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989. The word "survivor," as used in section 1174 of the Civil Code of California, refers only to the surviving spouse, and not merely the surviving individual whose character as a spouse has been destroyed by a decree of divorce, during the life of the former husband now deceased.—*Zanone v.*



Sprague, 16 Cal. App. 333, 116 Pac. 989. The words "husband and wife," as applied to domestic relations, each has but one meaning, viz., "a man who has a wife" and a "woman who has a husband," and can not mean an unmarried man and an unmarried woman, or a divorced man or a divorced woman.—Zanone v. Sprague, 16 Cal. App. 333, 116 Pac. 989. Upon the death of either spouse, the decedent's homestead rights inure to the survivor.—Hannon v. Southern Pac. R. Co., 12 Cal. App. 350, 107 Pac. 335; Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312.

#### REFERENCES.

Rights acquired, by survivorship, under homestead and exemption laws.—4 L. R. A. (N. S.) 365, 366. As to proof of survivorship, see Sanders v. Simcich, 65 Cal. 50, 2 Pac. 741, 743.

10. Law at death controls.—The law in force at the time of death controls on the subject of homesteads and the rights of survivors.—Rich v. Tubbs, 41 Cal. 34, 36; Estate of Headen, 52 Cal. 294, 297; Tyrrell v. Baldwin, 78 Cal. 470, 473, 21 Pac. 116; Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938; In re Thorn's Estate, 24 Utah 209, 67 Pac. 22, 23. Thus if the act under which a homestead was created was amended before the death of either husband or wife, the right of survivorship is governed by the amended law, and not by the original one.—Tyrrell v. Baldwin, 78 Cal. 470, 474, 21 Pac. 116. There can be no survivorship until a death has occurred; but the death of one of the spouses does not alter in any way the estate or title of the homestead.—Tyrrell v. Baldwin, 78 Cal. 470, 473, 475, 21 Pac. 116. And as the descent of the homestead to the surviving widow is governed by the law in force at the death of her husband, she becomes the owner in fee of the homestead property by virtue of her survivorship, and the title so acquired is not affected by the subsequent order of the court setting the property apart to her as a homestead. The effect of such order is to withdraw the property therein named from administration, but it does not qualify or affect the title that had vested in the widow at the instant of her husband's death.—Estate of Fath, 132 Cal. 609, 612, 64 Pac. 995. The law in force at the time of the death of one of the spouses governs. Law in force at time of declaration of homestead is not controlling.—Hannon v. Southern Pac. R. Co., 12 Cal. App. 350, 107 Pac. 335.

11. Right to homestead. "Family."—Where a husband owns an undivided interest in land, as a tenant in common with others, and is living thereon with his family, his wife may claim a homestead therein to the extent of the husband's undivided interest and to the value of five thousand dollars.—Higgins v. Higgins, 46 Cal. 259, 266; and although a widow has obtained a homestead, and she afterwards marries, she may claim another homestead out of the estate of her second deceased husband.—Higgins v. Higgins, 46 Cal. 259, 265. Where property was the separate property of the wife, and at her death was the homestead of herself and her husband by virtue of a declaration made

by her in due form, the husband, upon her death, acquires absolute title thereto. Upon the death of either spouse, the homestead selected from the community property, or from the separate property of the parties making the declaration, or joining therein, vests absolutely in the survivor. The survivor, in such case, takes his title by operation of law, and no order of court is necessary to perfect his title.—*Fisher v. Bartholomew*, 4 Cal. App. 581, 88 Pac. 608, 609. And the title thus acquired can not be affected by subsequent orders of the probate court. Hence, an order of the probate court authorizing a sale of the premises operates only upon the title then remaining in the estate of the decedent, which is nothing.—*Fisher v. Bartholomew*, 4 Cal. App. 581, 88 Pac. 608, 609. The statute of Oklahoma, which authorizes the survivor to continue to possess and to occupy the whole homestead until it is otherwise disposed of according to law, does not support the contention that any single survivor of the family may be entitled to the possession of the property as a homestead, unless such survivor is "the head of a family." To constitute a family, there must be a collection of persons living together. One person can not constitute a family, nor the head of a family.—*Betts v. Mills*, 8 Okla. 351, 58 Pac. 957. To impress land with a homestead character, some real interest or ownership must exist, and a mere gratuitous grantee of one who conveys to defraud his creditors does not acquire any real interest or ownership, and such grantee is not entitled to an injunction against the sale of said land in satisfaction of the grantor's debts.—*Kline v. Cowan*, 84 Kan. 772, 115 Pac. 587. Section 1 of article 17 of the state constitution of California does not forbid the legislature from extending the homestead privilege to persons other than heads of families.—*Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266. Under subdivision 2 of section 1260 of the Civil Code of California, others than heads of families may claim homesteads of certain value under the proper circumstances.—*Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266.

## REFERENCES.

What constitutes a "family," under the homestead and exemption laws.—See note 4 L. R. A. (N. S.) 365-398.

12. Abandonment. Statute of limitations. Selection.—A homestead may be abandoned by a deed in præsenti, vesting the title in the grantee upon condition subsequent, and containing a reservation to the grantor; and a reconveyance will not revive the homestead.—*Bank of Suisun v. Stark*, 106 Cal. 202, 207, 39 Pac. 531. If a widow does not know the law, that the homestead vested in her by the death of her husband, and, although she has able attorneys, she is not advised of her right to a probate homestead, and she relinquishes all rights in her husband's estate, but brings suit nearly nineteen years after his death to set aside such surrender of her homestead rights, the five-year statute of limitations applies to prevent her recovery. Such an action being one to settle and determine the question as to whether or

not plaintiff is the owner of the homestead is one for the recovery of real estate.—*Daniels v. Dean*, 2 Cal. App. 421, 84 Pac. 332, 334. Where a husband, the wife being dead, owned and occupied a tract of real estate as a homestead with his two minor children at the time of his death, and immediately after his death, the said minor children were moved from said land, and a guardian was appointed for them, and the guardian, in his capacity as such, leased the land and collected the rents therefrom, but did not occupy the same, and where none of the said children had occupied the land as a residence after the death of their father, it was held that such removal of the minor heirs from the land did not constitute a waiver or abandonment of the homestead; and further, that personal "possession and occupancy" of the land, by either the minor heirs or their guardian, was not necessary; that "possession and occupancy" by a tenant of the guardian was insufficient to preserve the homestead character of the land for the minor heirs; and that said land could not be subjected to the payment of the debts of plaintiff, created prior to the death of the father.—*Rockwood v. St. John's Estate*, 10 Okla. 476, 62 Pac. 277. A homestead selected by a wife from the separate property of her husband is not abandoned by a subsequent agreement between her and him for a division of the homestead between them, especially where it is not recorded by either of the parties. If a husband makes a filing upon public lands, before his marriage, the legal title acquired becomes his separate property; and a homestead filed thereon by the wife alone is not a "selection" from the "community property." If a wife files a declaration of homestead upon property at a time when all of the land in controversy is the separate property of her husband, the subsequent acquisition by her of the title to a part of the land as her separate property does not have the effect of changing the prior declaration into a selection by her of the homestead from her separate property. When the statute speaks of a selection of a homestead "from the separate property of the person selecting or joining in the selection of the same," it has reference to the status of the property as separate property at the time when the selection is made; and only in such case can there be properly imputed to the person making the selection an intention to dedicate his or her property for homestead purposes, and thus to vest in the other spouse an estate therein which, upon the contingency of survivorship, will ripen into an absolute title to the land so dedicated. It would be subversive of the object and purpose of the law to hold that the wife's subsequent acquisition of the property from which she selected a homestead, when it belonged to her husband, could be made to relate back to give to her former act in selecting such homestead an intention and purpose which did not in fact then accompany it.—*Estate of Lamb*, 95 Cal. 397, 406, 30 Pac. 568. Upon the issue whether or not a homestead has been abandoned, the main question is that of the real intent of the homestead claimant and its determination involves a question of fact.—*Carter v. Pickett*, 39 Okla. 144, 134 Pac. 440. Temporary ab-

sence from the homestead does not constitute an abandonment thereof, where there exists at the time a definite and fixed intention to return.—*Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441. Permanent removal from the state constitutes an abandonment of the homestead.—*Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441. Where the removal from the homestead is unaccompanied by a present intention, existing at the time of the removal, to return thereto, but instead by a mere probable future purpose to so do, dependent on a contingency which might never happen, the homestead exemption is thereby abandoned.—*Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441. The intention to return, by which the homestead rights are reserved, must be formed at the time the removal occurs. It can have no influence whatever in restoring the right once lost by actual abandonment, until executed by a resumption of the occupancy that formerly characterized it as a homestead.—*Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441. Proof of the abandonment of a homestead must be clear and convincing in its nature. But where the only evidence of consequence is that of the homestead claimant herself, and shows a removal from the state, without any fixed and definite intention to return, a finding by the trial court that the homestead was abandoned will not be disturbed on appeal.—*Carter v. Pickett*, 39 Okla. 144, 134 Pac. 441. Where the husband, without cause, abandoned his family who were residing upon the homestead, he may not maintain action of ejectment to dispossess his wife and family of said homestead or any part thereof.—*Gooch v. Gooch*, 38 Okla. 300, 47 L. R. A. (N. S.) 480, 133 Pac. 242, 243. Two things must concur to show an abandonment of a homestead, viz., an intent to abandon and actual abandonment.—*Edson-Keith & Co. v. Bedwell*, 52 Colo. 310, 122 Pac. 393. A homestead is abandoned by the acquisition of another.—*Northwest Threshing Co. v. McCarroll*, 30 Okla. 25 Ann. Cas. 1913B, 1145, 118 Pac. 352. A homestead can be abandoned in California only as provided for by section 1243 of the Civil Code of that state, that is, by a declaration of abandonment or by a grant thereof.—*Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266. Temporary absence will not defeat a homestead right and during such absence of the owner the premises may be rented without destroying their homestead character.—*Shattuck v. Weaver*, 80 Kan. 82, 101 Pac. 649. The word "abandoned" with reference to the abandonment of a homestead has a well defined meaning. It requires a union of the act of removing from the homestead, and an intention to not further retain it as a homestead, or the formation of an intention after such removal of remaining away; in other words the physical act of removing is not sufficient, unless intended or followed by an intention to actually abandon the homestead.—*Jones v. Kepford*, 17 Wyo. 468, 100 Pac. 924. A family homestead is abandoned only when departure from the premises by the parties concerned is done with actual intention never to return.—*Russell v. Koller* (Okla.), 174 Pac. 560, 562. The question whether a homestead has or has not been abandoned is to be determined by the particular facts and cir-

cumstances of each case.—*Elliott v. Bond* (Okla.), 176 Pac. 242. Findings that the claimant of a homestead had not abandoned her residence in the city in which the property in question is situated, and that she considered that city her residence, held to imply that she intended to return to the property and to occupy it as a home.—*Estate of Koehler*, *Koehler v. Gray*, 102 Kan. 878, 879, L. R. A. 1918D, 1088, 172 Pac. 25. Whether a person is capable of an intelligent design to abandon his old home and to acquire a new domicile in another state is a question of fact upon which, if the testimony be conflicting, the decision of the trial judge is final.—*Cadwalader v. Pyle*, 95 Kan. 337, 340, 148 Pac. 655.

### 13. Homestead vests how.

(1) **In general.**—Under section 1474 of the Code of Civil Procedure of California and of section 1265 of the Civil Code of that state, the right to have property upon which a homestead has been impressed vest absolutely in the surviving spouse depends upon the character of the property at the time the homestead upon it was selected. If the homestead was selected from the community property or from the separate property of the person selecting or joining in the selection of the same it vests absolutely in the survivor. It vests otherwise, if selected under certain conditions, from the separate property of either spouse.—*Wall v. Brown*, 162 Cal. 307, 122 Pac. 478. After a deed of gift to the wife, the homestead, which she had theretofore impressed on the whole property while it was community property, is not, as to the interest conveyed to her, to be deemed and treated as if selected from her separate property without her consent, and as vesting on her death in her heirs, under the provisions of section 1474 of the Code of Civil Procedure of California. On the contrary, upon the death of the wife, the whole of the property impressed with the homestead vested absolutely in the surviving husband.—*Wall v. Brown*, 162 Cal. 307, 122 Pac. 478.

(2) **Homesteads selected from community property.**—Where the homestead was selected from community property, it vests absolutely in the survivor at the death of either spouse.—*Tyrrell v. Baldwin*, 78 Cal. 470, 476, 21 Pac. 116; *Bollinger v. Manning*, 79 Cal. 7, 11, 21 Pac. 375; *Sheehy v. Miles*, 93 Cal. 288, 28 Pac. 1046; *Vandall v. Teague*, 142 Cal. 471, 76 Pac. 35; *Saddlemire v. Stockton Sav., etc., Soc.*, 144 Cal. 650, 79 Pac. 381; *Hibernia Sav. & L. Soc. v. Hinz*, 4 Cal. App. 626, 88 Pac. 730; and an order of court made purporting to set aside the homestead property "for the use of the family" does not in any way change or affect the rights of the survivor, but merely excludes the property from administration.—*Bollinger v. Manning*, 79 Cal. 7, 11, 21 Pac. 375. The probate court, in such a case, has no power to make a decree setting apart the property for the use of the family; and its effect, no matter how broad its language, is simply to take the property out of administration.—*Sheehy v. Miles*, 93 Cal. 288, 295, 28 Pac. 1046. As the wife becomes the owner of a homestead upon community

property immediately upon the death of her husband, the property retains its homestead character.—*Hibernia Sav. & L. Soc. v. Hinz*, 4 Cal. App. 626, 88 Pac. 730, 731; and the probate court has no jurisdiction over it; hence its order setting apart the homestead to the widow has no other effect than to take the property out of administration. The order could affect only the interest of the estate in the property, which in such a case would be nothing.—*Vandall v. Teague*, 142 Cal. 471, 474, 76 Pac. 35. Under section 1265 of the Civil Code of California and section 1474 of the Code of Civil Procedure of that state, the title to a homestead declared by a wife upon community property vests in her upon the death of her husband without any administration upon his estate.—*Hart v. Tabor*, 161 Cal. 20, 118 Pac. 252. If a declaration of homestead is filed on community property by either spouse the homestead vests in the survivor and the court must set aside the homestead in community property, even though it was not declared during the life of a deceased spouse, the property being exempt from debts of the surviving spouse on sale under execution.—*In re Cook's Estate*, 34 Nev. 217, 117 Pac. 29. Where a homestead is declared by the wife upon community property, and thereafter the husband makes a deed of gift of an undivided interest in the land to his wife, the interest conveyed vests in her as her separate property. Such a conveyance, however, does not have the effect to impair the homestead or to destroy the right of survivorship created thereby to the extent of the property conveyed.—*Wall v. Brown*, 162 Cal. 307, 122 Pac. 478. Under section 1265 of the Civil Code of California and section 1474 of the Code of Civil Procedure of that state, the title to a homestead declared by a wife upon community property vests in her upon the death of her husband without any administration upon his estate.—*Hart v. Taber*, 161 Cal. 21, 118 Pac. 252. Where a wife declares a homestead on community property, it vests in her absolutely, upon the death of her husband, without administration, and it need not be inventoried in administering his estate.—*Estate of Shirey*, 167 Cal. 193, 138 Pac. 994.

(3) Homesteads selected from separate property of persons selecting or joining in selection of same.—If the homestead selected by the husband or wife, or either of them, during their coverture, and recorded while both were living, was selected from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor.—*Estate of Croghan*, 92 Cal. 370, 371, 28 Pac. 570; *Estate of Fath*, 132 Cal. 609, 64 Pac. 995. Hence if the widow, upon the death of her husband, becomes, by virtue of her survivorship, the owner in fee of a homestead selected by the husband in his lifetime from his separate estate, the title thus acquired is not affected by a subsequent order of the court setting the property apart to her as a homestead. The effect of the order is simply to withdraw the property therein named from administration.—*Estate of Fath*, 132 Cal. 609, 612, 64 Pac. 995. In such a case the death of the husband does not affect the homestead selected

by him, but the homestead continues so long as it remains a homestead; and upon the death of the widow, leaving no minor children, there ceases to be any family for whose benefit the exemption exists and the homestead itself ceases to exist. It is subject to the widow's testamentary disposition, and in case she dies intestate, it descends to her heirs under the laws of succession.—Estate of Fath, 132 Cal. 609, 612, 64 Pac. 995. The amendment of 1880 to section 1474 of the Code of Civil Procedure of California made no change in the case of a homestead selected from community property; but with reference to homesteads selected from separate property, it distinguished between those selected by or with the consent of the owner of the property, and those selected by one of the spouses without the consent of the other. Those of the former class were made to go to the survivor; of the latter, to the heirs of the person from whose property the selection had been made. Thus the only change made by said amendment was with relation to homesteads selected from separate property where the owner of the property made the selection or joined in it. But in the case of a homestead selected by the wife from the separate property of the husband without his consent, such property went to the heirs, by the provisions of said section 1474, before as well as after the amendment of 1880.—Estate of McGee, 154 Cal. 204, 97 Pac. 299.

#### REFERENCES.

Amendment of 1880 to section 1474 of the Code of Civil Procedure of California made no change in the case of a homestead selected from community property.—See next subdivision, *infra*.

(4) Homesteads selected from separate property without owner's consent.—If the property was selected from the separate property of either the husband or wife without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the probate court to assign it for a limited period to the family of the decedent.—Estate of Croghan, 92 Cal. 370, 371, 28 Pac. 570; *Gruwell v. Seybolt*, 82 Cal. 7, 22 Pac. 938; Estate of Schmidt, 94 Cal. 334, 338, 29 Pac. 714; Estate of Lamb, 95 Cal. 397, 30 Pac. 568; Estate of Walkerly, 108 Cal. 627, 654, 49 Am. St. Rep. 97, 41 Pac. 772; *Weinreich v. Hensley*, 121 Cal. 647, 654, 655, 54 Pac. 254. It will be noticed that, under the laws of California, where a homestead has been selected from the separate property of a husband during his lifetime, and without his consent, it goes, upon his death, to his "heirs or devisees," subject to the power of the court to assign the same for a limited period, under section 1265 of the Civil Code of that state, while, by section 1474 of the Code of Civil Procedure of said state, the same property vests in "the heirs," subject to the same power of limited assignment in the court. For comment upon this inharmoniousness, see Estate of Walkerly, 108 Cal. 627, 654, 49 Am. St. Rep. 97, 41 Pac. 772; Estate of Matheny, 121 Cal. 267, 269, 53 Pac. 800. A widow is entitled to a homestead in the separate property

of her husband even where there are no minor children.—*Clarke v. Baker*, 76 Wash. 110, 135 Pac. 1028.

(5) *Homestead declared by husband.*—Where the husband made a valid declaration of homestead, the title thereto, upon his death, vests absolutely in his wife, and the children have no title or interest therein, whether the declaration was made upon community property, the separate property of the husband, or upon the separate property of the wife; because, if the land was the separate property of the wife, it was no part of the estate of the deceased husband, and the court sitting in probate had no jurisdiction over it, and could not deal with it as belonging to the estate.—*Saddlemire v. Stockton Sav., etc., Soc.*, 144 Cal. 650, 653, 79 Pac. 381. When the homestead is selected from the separate property of the husband, who joins in its selection as a homestead, then, upon the death of the wife, it goes absolutely to the surviving husband. By the death of his first wife, the homestead property vests in him as fully and perfectly as though no homestead had ever been carved out of it; the title to the property is not affected by his second marriage; and he may alone mortgage the homestead without the second wife's signature.—*Dickey v. Gibson*, 113 Cal. 26, 32, 54 Am. St. Rep. 321, 45 Pac. 15.

14. *Setting apart a homestead.*—It is the duty of the court below, where a homestead has been selected, first to ascertain what was legally held as homestead property at the time of the death of the deceased, and then set it apart for the use of the widow.—*Estate of Wixom*, 35 Cal. 320, 325. The court has a discretion to exercise in determining whether it will set aside a homestead from the separate property of the decedent, as well as the particular property which it will set aside, and also in determining the time during which it shall be held as a homestead. It is not required to set aside the property which was selected by the survivor, and is limited to selecting and designating property which is of no greater value than five thousand dollars. The court is not bound by the wishes of the applicant, but should exercise its own discretion and good judgment. The right to have it assigned for a limited period is not absolute, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it.—*Weinreich v. Hensley*, 121 Cal. 647, 655, 54 Pac. 254; *Estate of Schmidt*, 94 Cal. 334, 29 Pac. 714; *Estate of Lamb*, 95 Cal. 397, 30 Pac. 568. The right given to the probate court to set apart "to the family of the decedent," for a limited period, is not controlled or in any way affected by the wife's previous selection of a homestead.—*Warner v. Warner*, 144 Cal. 615, 619, 78 Pac. 24; *Weinreich v. Hensley*, 121 Cal. 647, 653, 54 Pac. 254. Although she filed a declaration of homestead upon her husband's separate property, her subsequent acquisition of a part of such property as her separate property does not convert the prior declaration into a selection by her to a homestead of her separate property. Upon her death, the



property so conveyed to her is to be treated as if the homestead had been selected without her consent, and as vesting in her heirs, subject to have it assigned for a limited period to the family of the deceased.—*Estate of Lamb*, 95 Cal. 397, 407, 30 Pac. 568. Where a homestead was declared by the wife upon her separate property, which was of such a kind that it could be impressed with the homestead characteristics, the title to it descends absolutely to the husband.—*Estate of Young*, 123 Cal. 337, 347, 55 Pac. 1011; *Estate of Croghan*, 92 Cal. 370, 28 Pac. 570. The right of the survivor to retain a home for such a limited period as the court may direct does not depend on the fact that there are children or others who may share in its use. In such event the petitioner may himself be regarded as constituting the "family" of deceased. It is true that the word "family," in its ordinary signification, and as used in the statute concerning the descent of a homestead, refers to two or more persons, and includes those living under the same roof, as kindred or dependents, under one head; but this word, as used in the statute confirming probate homesteads, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member. The object of the statute is to preserve the family home for the use and benefit of the survivor or survivors of those occupying it as such.—*Estate of Lamb*, 95 Cal. 397, 407, 30 Pac. 568. The bare intention to create a home on a vacant lot at some future time, unaccompanied with actual occupancy of the lot, is not sufficient foundation upon which to base a claim of homestead exemption against an execution.—*Laurie v. Crouch*, 41 Okla. 589, 139 Pac. 304. Where there is a fixed intention by an owner of a lot to presently occupy it as a home, accompanied with overt acts, which clearly manifest such intention, such as fitting up, building, or repairing a house thereon for occupancy, followed by actually moving thereon, without unreasonable delay, it might have the effect, at least in equity, of impressing the homestead character, so as to render the property exempt as against claims arising prior to actual occupancy by the family.—*Laurie v. Crouch*, 41 Okla. 589, 139 Pac. 304. Under the laws of Nevada, a widow is not entitled to have a homestead set apart to her out of the separate estate of her deceased husband.—*In re Cook's Estate*, 34 Nev. 217, 117 Pac. 31. The power of the court to set apart the homestead to the "innocent party" for a "limited period" in a divorce action may not be exercised arbitrarily; but must be exercised by the court reasonably, and according as the facts of the case demand that it shall be applied; yet it must be put into operation in behalf of the wife, if she would retain any interest whatever in the homestead selected from the separate estate of the husband.—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989. In a divorce proceeding it is competent for the court in the decree to set aside the homestead to either party; but where no disposition is made thereof, the homestead remains to the husband, as the head of the family, discharged of all homestead rights or claims of the other party.—*Golds-*

borough v. Hewitt, 28 Okla. 66, 138 Am. St. Rep. 795, 99 Pac. 907. When under the laws of the state of Utah a homestead has been set apart to a surviving spouse and minor children, or if there be no minor children to the surviving spouse, or, if there be no surviving spouse, to the minor children, the homestead becomes the absolute property of the persons to whom it was set apart, and it belongs to them (subject of course to any incumbrance given for the purchase price and other valid liens) and in such case the other heirs have no interest in or to a homestead so set apart.—Christensen v. Robinson, 35 Utah 67, 99 Pac. 459.

15. Order. In general.—In making an order setting aside a homestead to the widow for her lifetime, it is not proper for the court to decree to whom the fee in remainder shall vest upon her death. It should not undertake to adjudicate the question of heirship. When there is a contest between different persons claiming, in hostility to each other, to be heirs, that contest must be adjudicated in an appropriate action or proceeding in which the issue of heirship properly arises.—Estate of Firth, 145 Cal. 236, 340, 78 Pac. 643. If the entire estate set apart to the widow as a homestead was the separate property of the husband, and the order setting it aside did not limit the homestead to a life estate in the widow, but set it aside to her absolutely, the order of course is erroneous, but if the time to appeal from the order has expired, and no appeal was taken, title in fee, under the order, vests in the widow, for the order, though erroneous, was not void; and, in such a case, the court has no power to order the executors to discharge liens upon the property.—Estate of Huelsman, 127 Cal. 275, 276, 277, 59 Pac. 776.

16. Order. Effect of.—Title is not adjudicated by an order of the court setting apart premises as a homestead for the family, and one who opposes the order is not precluded from establishing his title in a proper action for that purpose.—Dickey v. Gibson, 121 Cal. 276, 278, 53 Pac. 704. Even an order setting apart a probate homestead for the use of the family, including the widow and children, does not affect her absolute title, or confer any title upon the children by adjudication. The only effect of the order is to withdraw the premises therein named from administration.—Saddlemire v. Stockton Sav., etc., Soc., 144 Cal. 650, 653, 79 Pac. 381. So if a homestead selected by the husband, in his lifetime, from his separate estate vests absolutely in his surviving wife, an order setting apart the property to the widow as a homestead, pending the administration of her husband's estate, does not affect the widow's title by survivorship. Its only effect is to remove the homestead from administration of the husband's estate.—Estate of Fath, 132 Cal. 609, 612, 64 Pac. 995. Where the survivor takes his title to a homestead by operation of law, no order of the court is necessary to protect his title.—Fisher v. Bartholomew, 4 Cal. App. 581, 88 Pac. 608, 609. The effect of an order of a probate court setting apart,

for a limited period, separate property of a decedent to the surviving spouse, which has already been devised to another person, and upon which no antemortem homestead has been filed, is to invalidate the devise, and such property should be distributed to the heirs at law of the decedent, subject to the homestead.—*Estate of Matheny*, 121 Cal. 267, 268, 53 Pac. 800.

17. *No money in lieu of.*—If the widow seeks to have set apart to her a homestead out of the separate property of her deceased husband, but there is no separate property, the court has no authority to award a sum of money as a substitute for a homestead. There is no provision of the codes which authorizes such an order, and, by strong implication, such an order is prohibited.—*Estate of Noah*, 73 Cal. 590, 593, 2 Am. St. Rep. 834, 15 Pac. 290; *Estate of Isaacs*, 30 Cal. 105, 109.

18. *Appraisement.*—Under section 1476 of Code of Civil Procedure of California, the homestead is treated as having vested at the time of its selection; but, under section 1465 of that code, it is created by the order of the court. The appraisement provided for in section 1476 applies to a selected homestead, and the value is to be fixed as of the time the homestead was selected. Section 1465 does not, in itself, require any appraisement; and so much of section 1476 as requires an appraisement can not be applied in the case of a probate homestead, for the reason that it relates to a selected homestead and to an entirely different time.—*Estate of Walkerly*, 81 Cal. 579, 583, 22 Pac. 888. The court provides for the appointment of appraisers in certain cases, where there is a question as to the value of the homestead; and the court is authorized to appoint appraisers, in the first instance, upon proof made of service upon the defendants of a copy of the petition and notice of the time and place of hearing, as provided in sections 1248 and 1249 of the Civil Code of California.—*Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038, 1040. If a vacancy is caused in a board of appraisers by the absence of one of the appraisers from the county, the court has authority to appoint another person without further notice; and either party has, of course, the right to move the court to vacate such appointment, or to set aside the report of appraisers, upon a reasonable showing that the appointee is unfit, incompetent, or disqualified.—*Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038, 1040. But a day for hearing and notice of the hearing must be given, under section 1478 of Code of Civil Procedure of that state; and if it be conceded that the court has the right to order a reappraisement of the homestead under that section, it must be admitted that, under the same section, the court should set a day for hearing any objections to the report made by the new appraisers, and cause notice thereof to be given. Hence it is error if the court not only does not set a day for hearing any objections to the report, but refuses to hear the objections of a creditor upon his direct application

to be heard.—*Estate of McCarthy*, 1 Cal. App. 467, 471, 82 Pac. 635. On an appeal from a judgment confirming the report of appraisers setting apart a homestead, the evidence may be reviewed, if the appeal was taken within sixty days.—*Estate of Crowey*, 71 Cal. 300, 302, 12 Pac. 230. The Civil Code of California, section 1248, requires notice of time and of hearing in proceedings for appraisement and segregation of homestead from other property to be served on claimant at least two days before hearing.—*Blood v. Munn*, 155 Cal. 228, 100 Pac. 694. Effect of segregation under section 1248 of the Civil Code of California, of homestead from other property in bankruptcy proceedings, is to divest segregated property of homestead character and to render the same liable for debts.—*Blood v. Munn*, 155 Cal. 228, 100 Pac. 694.

19. Value.—The value of an antemortem homestead is limited to \$5000. The court has no power to select and designate property of a greater value than that amount.—*Estate of Delaney*, 37 Cal. 176, 181; *Higgins v. Higgins*, 46 Cal. 259, 266; *Weinreich v. Hensley*, 121 Cal. 647, 655, 54 Pac. 254; *Estate of Herbert*, 122 Cal. 329, 331, 54 Pac. 1109; *People v. Gallanar*, 144 Cal. 656, 663, 79 Pac. 378. If the premises selected as a homestead from community property do not exceed in value the sum of \$5000 at the time they were appraised in the probate proceedings, it is the imperative duty of the court to make the order setting them off as a homestead to the petitioner.—*Estate of McCarthy*, 1 Cal. App. 467, 82 Pac. 635. The homestead character applies only to so much of the property as does not exceed \$5000 in value. If what is actually used as a homestead is of a greater value than \$5000, the excess is not homestead under the statute, though so in fact. At its inception, the homestead is limited to \$5000 in value, and when the property is enhanced in value, so that it exceeds the statutory limit, the excess does not constitute a part of the statutory homestead. If the premises are worth \$5000, every increase in value works a reduction in the area of the homestead; and where the statute does not contain any other provision for determining the area of the homestead, if the selected premises exceed \$5000 in value, it is the duty of the court, nevertheless, to ascertain the amount of land necessary to make up the value of the exemption, and set off that amount alone as the homestead.—*Bank of Woodland v. Stephens*, 144 Cal. 659, 663, 79 Pac. 379; *Estate of Delaney*, 37 Cal. 176, 180; *Gregg v. Bostwick*, 33 Cal. 220, 228, 91 Am. Dec. 637. Where, upon the death of the homestead claimant, the inventory shows that the premises claimed exceeded \$5000 in value, the method of determining what part is homestead and what part is subject to the debts of the deceased is prescribed, in California, by sections 1476 et seq. of the Code of Civil Procedure.—*Bank of Woodland v. Stephens*, 144 Cal. 659, 663, 79 Pac. 379. Said section 1476 applies to homesteads created by a declaration made and recorded, and it applies alone to such character of homesteads.—*Estate of Herbert*, 122 Cal. 329, 331, 54 Pac. 1109. Sections 1465 and 1476 of the Code of Civil Procedure of California are to be applied

in setting apart a homestead created by an insolvent debtor in case the value of the premises exceeds \$5000; and in fixing the valuation of homestead premises, liens or incumbrances of any character are not an element entering into the question.—Estate of Herbert, 122 Cal. 329, 331, 54 Pac. 1109. In case the homestead is of less value than \$5000 at the time of its selection, it goes absolutely to the survivor, although at the time of the death of the husband its value may exceed \$5000.—Estate of Burdick, 76 Cal. 639, 641, 18 Pac. 805; and in case the value of the estate of a deceased husband is less than \$1500, it is proper for the court to set it apart, without further administration, to the widow, although she claims a homestead upon the separate property of the husband, he not joining therein. Such a proceeding is under section 1469 of the Code of Civil Procedure of California, which deals specifically with the special subjects of the estate less in value than \$1500.—Estate of Neff, 139 Cal. 71, 72, 72 Pac. 632. There seems to be no impropriety, in the state of Nevada, in setting apart a homestead to the value of \$5000 out of property worth \$7500, without defining the boundary or extent necessary to reach that sum, or without ascertaining whether the premises can be divided. The necessity for this division or determination may never arise, and it is better that the trouble and expense incident to a division of the homestead be avoided until the time arrives, if ever, when the occupants of the homestead and the owner of the excess can not agree, and then the tenant in common, who is dissatisfied, can proceed under the general statute allowing and regulating suits for partition.—In re Quinn's Estate, 27 Nev. 156, 74 Pac. 5, 6. The homestead exemption of a childless surviving spouse is in the sum of \$5000, and is not limited to \$1000, as prescribed in section 1260 of the Civil Code of California, in a case where the debt sought to be enforced was contracted during the existence of the community and of the homestead, and where the homestead itself was declared during coverture upon community property.—Robinson v. Dougherty, 118 Cal. 299, 300, 50 Pac. 649. A wife may select property to the value of \$5000, under sections 1260 and 1263 of the Civil Code of California, as a homestead.—MacLeod v. Moran, 11 Cal. App. 622, 105 Pac. 932.

20. Division or sale.—The appraisers must determine whether the premises can be divided without material injury, where they are worth more than \$5000. If they can, they must proceed to admeasure and set apart a portion not to exceed in value \$5000; otherwise, provision is made for sale.—Estate of Herbert, 122 Cal. 329, 331, 54 Pac. 1109; Estate of Burdick, 76 Cal. 639, 641, 18 Pac. 805. The statute is clear, that if a homestead was declared in the lifetime of the deceased, and if it is appraised at more than \$5000, and can not be divided, the whole may be sold, and \$5000 of the proceeds be set apart in lieu of the homestead claim.—Lord v. Lord, 65 Cal. 84, 85, 3 Pac. 96.

21. Rights and title of survivor, heirs, successors, and children.—Where one of the spouses takes title to a homestead by survivorship,

such title is not affected by orders of the probate court respecting the homestead.—*Saddle-mire v. Stockton Sav., etc., Soc.*, 144 Cal. 650, 79 Pac. 381; *Estate of Fath*, 132 Cal. 609, 612, 64 Pac. 995. Section 1468 of the Code of Civil Procedure of California is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and to withdraw it from disposition made by the testator under his will.—*Estate of Matheny*, 121 Cal. 267, 269, 53 Pac. 800. The power of the court to set property apart as a probate homestead is paramount to the power of the testator to devise his estate, and can not be affected by a specific devise of the property.—*Estate of Huelsman*, 127 Cal. 275, 277, 59 Pac. 776. A widow, who takes a homestead, can not claim that a specific devise to her is exempt from the payment of debts of the estate.—*Estate of Huelsman*, 127 Cal. 275, 59 Pac. 776. Where a widow becomes the owner in fee of homestead property by virtue of her survivorship, and she dies, leaving no minor child, there ceases to be any family for whose benefit the exemption exists, and the homestead itself ceases to exist. It is subject to her testamentary disposition, and in case she dies intestate, it descends to her heirs, under the laws of succession.—*Estate of Fath*, 132 Cal. 609, 612, 64 Pac. 995. And, under the statute which provides for the protection of "persons succeeding, by purchase or otherwise, to the interests, rights, and title of successors to homesteads," those who acquire the title of a successor to a homestead hold the property under the same exemption as did the person to whose interest they have succeeded.—*Estate of Fath*, 132 Cal. 609, 612, 64 Pac. 995. Section 1485 of the Code of Civil Procedure of California does not apply to probate homesteads.—*Estate of Moore*, 57 Cal. 437, 443. If a probate homestead has been set apart out of the estate of a deceased person to his widow and minor children, one-half of which was to go to the widow and the other half to the children, the title is in the widow and minor children during the latter's minority. When the children arrive at majority, their interest in the homestead ceases, and whatever property rights they thereafter have in the land covered by the homestead are in the nature of remainderman or reversioners; but so long as the widow sees fit to continue in the family home, the grantee of one of the children can not legally go into possession of the homestead as a tenant in common with the widow.—*Moore v. Hoffman*, 125 Cal. 90, 92, 73 Am. St. Rep. 27, 57 Pac. 769. If the title of the homestead vests absolutely in the wife upon the death of her husband, and the homestead declared by the husband, whether it is upon community property or upon the separate property of the husband, or upon the separate property of the wife, the children have no interest or title therein; and no title is conferred on them by an order of the probate court setting the homestead apart for the use of the family, including the widow and children.—*Saddle-mire v. Stockton Sav., etc., Soc.*, 144 Cal. 650, 654, 79 Pac. 381. The tenure by which a homestead is held by the survivor of a community

depends upon the nature of the title to the land from which the homestead is selected. If it is selected from community property in the lifetime of both spouses, it vests in the survivor in fee, and becomes his or her separate property. If it is selected from separate property, it goes, on the death of the person from whose property it was selected, to the heirs or devisees of such person, subject to the power of the court to assign it for a limited period to the family of the decedent.—Estate of Gilmore, 81 Cal. 240, 243, 22 Pac. 655. Where a husband dies seized in fee of land occupied and used by himself and family as a homestead, his surviving wife, although without children, is entitled, as against his heirs, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintaining a home thereon.—Holmes v. Holmes, 27 Okla. 140, 30 L. R. A. (N. S.) 920, 111 Pac. 220. The homestead in the surviving spouse is subject to any mortgage by one in which the other joined.—Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312. The surviving spouse having died, heirs have not, under section 1485 of Code of Civil Procedure of California, a right to have property other than homestead first applied to payment of debt secured by mortgage.—Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312. When a husband dies seized in fee of land occupied and used by himself and family as a homestead, his surviving wife, although without children, is entitled by reason of the statute of Oklahoma, as against his heirs, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintaining a home thereon.—Holmes v. Holmes, 27 Okla. 140, 30 L. R. A. (N. S.) 920, 111 Pac. 220.

#### REFERENCES.

Rights of children in decedent's homestead.—See note 56 L. R. A. 33-89. Succession to rights of homesteader on his death before perfection of title.—See note ante, on the Law of Succession.

#### 22. Exemption of homestead.

(1) In general.—Where a wife, after the death of her husband, continues to reside upon the family homestead, although she is its sole occupant, it is exempt against her own creditors, as well as the creditors of her husband's estate, irrespective of the time the indebtedness was incurred, and without regard to which spouse held the legal title to the property during the married life.—Weaver v. First Nat. Bank, 76 Kan. 540, 123 Am. St. Rep. 155, 16 L. R. A. (N. S.) 110, 94 Pac. 273. The use of merely formal phrases will not make a devise of a homestead subject to the payment of the testator's debts. To do so, the language employed must be unequivocal and imperative. A wife, upon the death of her husband, may elect to take title under his will to their homestead, which she continues to occupy, without subjecting it to the payment of his debts.—Cross v. Benson, 68 Kan. 495, 64 L. R. A. 560, 75 Pac. 558, 559. The fact that the wife was administratrix of her husband's estate, and the homestead property was appraised

as part thereof, and distributed by the decree of distribution in undivided shares to her and to the children of the intestate, is not, as against a mere personal judgment creditor of the wife, a conclusive adjudication of the non-homestead character of the property and does not estop her from asserting her homestead right to the whole thereof.—*Hart v. Tabor*, 161 Cal. 20, 118 Pac. 252. Under the laws of Oregon, a homestead is exempt from execution where it is the actual abode of and owned by some member of the family.—*Wilson v. Peterson*, 68 Or. 525, 136 Pac. 1187. The statutory exemption of the homestead from judicial sale for the satisfaction of a judgment may be waived or relinquished by abandonment of the homestead or by a conveyance thereof.—*Dans v. Low*, 66 Or. 599, 135 Pac. 315. Where a husband and wife occupy real estate owned by him as a homestead, his death will not operate to deprive the wife of the homestead exemption, although she may be the sole surviving member of the family, nor do the statutory provisions regarding the descent of the property to the surviving widow make her homestead subject to the payment of her husband's debts.—*Sawin v. Osborn*, 87 Kan. 828, Ann. Cas. 1914A, 647, 126 Pac. 1074. Deeds made by or between the spouses with intent to protect against the claims of creditors do not defeat the right to claim a homestead in the property. The decree sought for in a suit to set aside such deeds on the ground of fraud, being tantamount to an execution, would be covered by the exemption clauses of the statute.—*Bowman v. Sherrill*, 59 Or. 603, 117 Pac. 1122. Under the facts stated in the opinion it is held that a tract of land is not occupied as a residence of the family of the owner, so as to exempt it from sale upon execution for his debts.—*Quinton v. Adams*, 83 Kan. 484, 112 Pac. 95. The Oregon statute as to homesteads is only a statute of exemption and contains no other elements. It does not create a homestead in which the wife or children have any right other than the right of owner thereof, or the wife, husband, agent, or attorney of said owner, to claim it exempt from attachment, levy, or sale on execution and this right continues after the death of the owner.—*Mansfield v. Hill*, 56 Or. 400, 107 Pac. 473. Sections 5 and 6 of the Kansas statute of descents and distributions providing for the distribution of the homestead of an intestate, are not in conflict with the provisions of section 9, article 15, of the constitution exempting the homestead from forced sale under any process of law.—*Towle v. Towle*, 81 Kan. 675, 27 L. R. A. (N. S.) 550, 107 Pac. 228. The sale of a homestead in partition under the provisions of section 6 of the statute of descents and distribution of the state of Kansas is not a forced sale within the meaning of that term as used in section 9 of article 15 of the constitution.—*Towle v. Towle*, 81 Kan. 675, 27 L. R. A. (N. S.) 550, 107 Pac. 228. While the legislature of the state of Kansas is without power to enact a law limiting or restricting the homestead right guaranteed by section 9 of article 15 of the constitution of that state, it has the power to enact laws which in effect add to or increase the exemptions provided by the



constitution.—*Towle v. Towle*, 81 Kan. 675, 27 L. R. A. (N. S.) 550, 107 Pac. 228. Where the daughter of an intestate occupies his homestead under such circumstances as to render it exempt from liability for his debts, and the property is taken for public purposes by eminent domain, she is entitled to compensation, not only for the share of the property owned by her, but also for the right to occupy the whole.—*Estate of Koehler*; *Koehler v. Gray*, 102 Kan. 878, 882, L. R. A. 1918D, 1088, 172 Pac. 25.

(2) *Policy of the law.*—The provisions of the Civil Code of California, by which the wife is authorized to select a home for herself and the family out of the separate property of the husband, that shall be exempt from the effect of misfortune or improvidence on his part, as well as from the importunity or rapacity of his creditors, have been enacted in pursuance of the public policy declared in the constitution, and, being remedial in their nature, are to receive a liberal construction.—*Warner v. Warner*, 144 Cal. 615, 618, 78 Pac. 24; *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26, 24 Pac. 852; *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853. To the extent that these provisions are enacted in the interest of the wife, the policy in pursuance of which they are enacted, as well as the purposes of their enactment, is to be considered in the construction of any agreement by her in reference thereto. She is not to be held to have surrendered the rights conferred by these provisions, except by clear and expressive language.—*Warner v. Warner*, 144 Cal. 615, 618, 78 Pac. 24. Having regard to the policy of the law, it seems plain that only the homestead, or the homestead estate, if it may be so called, is thus exempted from creditors' claims, and that the law evinces no such tenderness or regard for the heirs (except in the case of estates in value of less than \$1500 as would justify the conclusion that it means to prefer their claims to the claims of the creditors of the estate. In other words, the manifest policy of the law is to subject all property, excepting that exempt from execution, the homestead estate, and the property of estates in value less than \$1500, to just claims of creditors.—*Estate of Tittel*, 139 Cal. 149, 153, 72 Pac. 909. Homestead and exemption laws are not in derogation of the common law, but are to be liberally construed for the purpose of giving effect to the beneficent object in view.—*Edson-Keith Co. v. Bedwell*, 52 Colo. 310, 122 Pac. 393. Whatever liberality should be given the construction of the homestead exemption laws of the state of Utah, they ought not to be so construed as to give a debtor the power by his own acts to deprive others of rights previously obtained in his property.—*Volker Scowcroft Lumber Co. v. Vance*, 36 Utah 348, Ann. Cas. 1912A, 124, 24 L. R. A. (N. S.) 321, 103 Pac. 970, 974. Parties may make, previously to their intermarrying, agreements that will be enforced afterwards, in respect to their property; but this does not include agreements as to homestead exemptions; such an inclusion would be contrary to public policy.—*Swingle v. Swingle*, 36 N. D. 611, 620, 162 N. W. 912.

(3) *Construction of codes.*—In section 1474 of the Code of Civil Procedure of California, dealing with the case of the homestead selected from the separate property of its owner during his lifetime, the law is particular to declare that it shall not be subject to the payment of any debt or liability contracted by or existing against the husband or wife, or either of them, at the time of the death of such husband or wife, except as provided in the Civil Code of that state. Section 1265 of the Civil Code of said state, with like particularity, provides that, "upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title." In section 1468 of the Code of Civil Procedure of that state, there is no such provision, and the simple language is, that title vests in the heirs. This distinct difference is well founded in reason. The law has regard for the family as the basic unit of society, and for that reason protects the family home. In the case of the death of either spouse, in contemplation of the situation of minor and dependent children, it makes provision securing the surviving spouse and such children in the homestead. And where the estate is of small value, the law entirely cuts off the rights of the creditors, deeming it of paramount importance that the property of the deceased should be devoted to the maintenance and support of the family. Moreover, in the case of a homestead declared during the lifetime of the owner, all who may give credit to the family do so with knowledge that they can have no recourse to the homestead for their debts. But where a homestead was set apart to the widow out of the separate estate of her deceased husband during widowhood, the estate of his heirs is alienable at their pleasure, and alienable by operation of law, and is likewise subject to the just demands of creditors of the estate.—*Estate of Tittel*, 139 Cal. 149, 153, 72 Pac. 909. Section 1468 of the Code of Civil Procedure of California, fixing the title of the property selected as a homestead for the use of the surviving husband or wife and the minor children, does not effect such a direct statutory distribution of the property as both to remove it from the administrative control of the court in probate, and at the same time from the reach of the creditors of the estate.—*Estate of Tittel*, 139 Cal. 149, 150, 72 Pac. 909. But those who acquire the title of a successor to a homestead hold the property under the same exemption as did the person to whose interest they have succeeded.—*Estate of Fath*, 132 Cal. 609, 612, 64 Pac. 995. It is sufficient to stay a judicial sale of a homestead under a judgment if the notice of claim of homestead be given to the sheriff any time before the sale.—*Wilson v. Peterson*, 68 Or. 525, 136 Pac. 1187. The homestead of a family, whether title to the same shall be lodged in or owned by the husband or wife shall be reserved to every family in the state of Oklahoma, exempt from attachment or execution, and every other species of

forced sale for the payment of debts.—*Alton Mercantile Co. v. Spindel*, 42 Okla. 210, 140 Pac. 1168.

(4) "Family" of owner.—Although, under the provisions of the Kansas constitution, "a homestead occupied as a residence by the family of the owner shall be exempt from forced sale under any process of law," a right to exemption can not originate without the existence of a family,—of a household consisting of more than one person,—yet when the homestead character has once attached, it may persist for the benefit of a single individual, who is the sole surviving member of the family.—*Weaver v. First Nat. Bank*, 76 Kan. 540, 123 Am. St. Rep. 155, 16 L. R. A. (N. S.) 110, 94 Pac. 273, overruling *Ellinger v. Thomas*, 64 Kan. 180, 67 Pac. 529. Under the terms of the constitution of Kansas, the area and appurtenances of the home are expressly limited; the beneficiary of the right is expressly limited; the manner of its enjoyment is expressly limited; the method of transferring the estate and the land it covers is expressly limited; the charges which may be made are expressly limited; and the character of process upon which it may be sold is expressly limited; but the time during which occupation by the family of the owner shall be a barrier against its appropriation for debts is not limited. There is no time appointed beyond which it shall not endure; and so long as family occupation as residence persists, no creditor may intrude upon the sanctity of the homestead demesne. Hence, if a husband and wife occupy a tract of land belonging to him as a homestead, she is the "family" of the owner, within the meaning of the constitution; and his death does not deprive her of the right to continue to be so designated, in order to maintain the homestead, to which she takes title, and which she continues to occupy free from forced sale under process of law for the payment of his debts; and, though the statute of descents and distribution may enlarge the right of an exemption of real estate from appropriation to the payment of debts, yet it cannot restrict the constitutional guaranty.—*Cross v. Benson*, 68 Kan. 495, 64 L. R. A. 560, 75 Pac. 558, 561. In Oklahoma he who claims a homestead as exempt on the ground that he is "the head of a family" must be able to show that there are others besides himself, who together form the family, and who are legally dependent upon him, and whom he is legally obliged to care for.—*Betts v. Mills*, 8 Okla. 351, 58 Pac. 957. The owner of eighty acres of farming land, occupied by himself and wife as their homestead, died; the widow continued to occupy it as a homestead; their children had all arrived at the age of majority and lived in homes of their own. It was held that the widow was "the family of the owner," and, as such, was entitled to hold the homestead exempt from the payment of the debts of her husband so long as she continued to occupy it.—*Aultman, M & Co. v. Price*, 68 Kan. 640, 75 Pac. 1019. Where a man died intestate, and his widow continued to reside on the farm as a homestead, but, in proceedings brought in the probate court by the creditors of the intestate's estate, it appeared that the children had attained their majority and

were living elsewhere; that the widow had previously conveyed to her daughter an undivided one-half interest in the farm, but in the deed conveying such interest had preserved to herself the possession, use, and profits of the land during her lifetime; and that she had not only not abandoned the homestead, but, on the contrary, was intending to make the farm her home as long as she lived, her support being derived from the rental thereof,—it was held that an order from the probate court directing the administrator to sell an undivided one-half interest in the farm for the payment of debts owing by deceased was erroneous.—*Harclerode v. Green*, 8 Kan. App. 477, 54 Pac. 505. If, however, a man and his wife have a homestead, and both die, leaving no minor children, and none of their children ever resided upon the land, no conveyance of which was made while it was occupied as a homestead, such land, after the death of both husband and wife, is subject to sale for the payment of the debt of the husband, which he owed at the time of his death, and it is the duty of the executor or administrator of his estate to sell the land for the payment of his debts, where the husband left no real or personal property, other than the land so occupied as a homestead.—*Stratton v. McCandliss*, 32 Kan. 512, 4 Pac. 1018, 1021. The benefits of a homestead exemption provided by the constitution of Oklahoma are not reserved to the head of the family alone, but to the entire family, without regard to whether the husband or the wife is the owner of the title.—*Gooch v. Gooch*, 38 Okla. 300, 47 L. R. A. (N. S.) 480, 133 Pac. 242. When the ownership of property, impressed with a homestead character, vests in a member of the family, in virtue of the provisions of a will, the homestead exemption survives to the same extent as though title had passed to the same person by inheritance.—*Hicks v. Sage*, 104 Kan. 723, 180 Pac. 780. Property occupied as the homestead of the owner and his family remains exempt from sale for the payment of his debts after the death of himself intestate, and his wife, so long as an unmarried daughter of full age, who had lived with him as a part of his family, continues her residence thereon without interruption. (*Batley v. Barker*, 62 Kan. 517, 64 Pac. 79, overruled).—*Estate of Koehler*, *Koehler v. Gray*, 102 Kan. 878, 880, L. R. A. 1918D, 1088, 172 Pac. 25.

(5) *Limit as to value.*—In California no limit is placed by the code on the amount of property that may be claimed as a homestead, except to confine it to the value of \$5000, and, however great the area, no division can be had in court except for excess of that amount in value.—*Payne v. Comings*, 146 Cal. 426, 429, 106 Am. St. Rep. 47, 80 Pac. 620. To the extent that an indivisible homestead exceeds five thousand dollars in value, it may be subjected to the payment of the debts of the deceased, but not until after all other available assets of the estate are exhausted.—*Calmer v. Calmer*, 15 N. D. 120, 106 N. W. 684. That the homestead had a value in excess of \$2000 and that the court erred in failing to direct that the statutory steps be taken to subject it for

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sale for the excess value can not be raised for the first time on appeal.  
—*Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 393.

### 23. Alienation of homestead.

(1) *In general.*—After a homestead had been declared by a husband and wife, they thereby acquired a common interest in the property, which was, during the life of both, somewhat akin to a joint tenancy; and after such declaration the homestead could not be conveyed or encumbered except by an instrument executed and acknowledged by both of them.—*Cordano v. Wright*, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227. A homestead is purely statutory and therefore gives no greater right nor estate than the statute creates, and if the statute contains no prohibition against a conveyance or devise, then none exists.—*Mansfield v. Hill*, 56 Or. 400, 107 Pac. 473. Considering the constitutional and statutory provisions of the state of Wyoming as a whole, it was clearly the intention of the legislature to require that an instrument of alienation of a homestead or any interest therein should contain a clause releasing or waiving the right of homestead and reference should be made thereto in the certificate of acknowledgment, to make a valid conveyance of a homestead or to release the homestead interest in the land conveyed.—*Jones v. Losekamp*, 19 Wyo. 83, 114 Pac. 675.

(2) *Necessity of consent, or joinder.*—Where property has once been impressed with the homestead character, no act or omission on the part of the husband, without the consent of his spouse, can result in an abandonment of the homestead by the family. The homestead is for the benefit of the entire family, and such joint interest is to be regarded as paramount to the rights of any individual member thereof.—*Alton Mer. Co. v. Spindel*, 42 Okla. 210, 140 Pac. 1168. A homestead can be alienated or incumbered only by the joint consent of the husband and wife, and when the title is in the wife, the written consent of the husband to mortgage on certain conditions is not sufficient when such conditions are not accepted.—*National Bank of Norton v. Duncan*, 87 Kan. 610, 125 Pac. 76. Prior to the Oklahoma Act of March 15, 1905, the title for homestead was in the husband as the head of the family. If title to property occupied by the family was in the wife, she could convey it without the joinder of the husband in the deed, for the reason that the same did not become impressed with the character of a homestead.—*Herbert v. Wagg*, 27 Okla. 674, 117 Pac. 210. A homestead, the title to which is in the husband, can not be sold or otherwise alienated by the husband without the wife joining in the conveyance, unless the wife has voluntarily abandoned the husband or, for any cause, has taken up her residence out of the state for a period of one year or more. A deed to a homestead executed by a husband without such abandonment or removal of residence on the part of the wife is void.—*McWhorter v. Brady*, 41 Okla. 333, 140 Pac. 782, 783. Homesteads being unknown at common law, exist only by statutory or constitutional

provisions. (a) In the absence of some statutory provision limiting the right of the husband to incumber the homestead, he may sell or incumber the same without the joinder or consent of his spouse, and such alienation or incumbrance made without her consent is valid and binding.—*Maloy v. Wm. Cameron Co.*, 29 Okla. 763, 119 Pac. 587. Where a gas company has run its pipe line across homestead property and it appears that the husband and wife have each separately given consent thereto, it is immaterial that the consent was not given jointly.—*Wichita Natural Gas Co. v. Ralston* (*Ralston v. Wichita Natural Gas Co.*), 81 Kan. 86, 105 Pac. 480.

(3) By agreement or contract.—Under the Oklahoma statute of 1901, which provides that no deed, mortgage, or contract relating to the homestead shall be valid unless in writing and subscribed to by both husband and wife, an instrument executed by the husband alone, conveying a right of way for a period of ten years over the part of the homestead, is not valid as against the wife. Such a contract being invalid in 1906 at the time of its execution, was not validated by the subsequent adoption of section 1 of article 12 of the constitution, limiting the value of the homestead to \$5000.—*Kelly v. Mosby*, 34 Okla. 218, 124 Pac. 984. Where land is occupied by a son and his wife and the son has supported his father for a number of years under an agreement that he is to become at once the owner of the land and that the legal title is to be vested in him at his father's death by will or otherwise, and the son in reliance on such agreement has improved the property and performed services and has also obtained an injunction against the execution by his father of a deed to some one else, the title to the land can not be affected by an instrument signed by the son alone, and to which his wife has not consented.—*Holland v. Holland*, 89 Kan. 730, 132 Pac. 989. The owner of land occupied by himself and wife as their homestead made, without his wife's knowledge or consent, a verbal agreement with an adjoining landowner by which a fence standing on the homestead should be the boundary line and for some years thereafter the agreement was acquiesced in by both parties and defendant occupied up to the fence. Thereafter the owner of the homestead, his wife joining, sold and conveyed the entire tract of land to the plaintiff, who sued the defendant in ejectment to recover the strip of land between the true boundary and the fence. Held that the land being a part of the homestead, the agreement or contract with the husband, made without the joint consent of the wife, was ineffectual, and that upon the facts stated in the opinion the plaintiff was entitled to judgment.—*Kastner v. Baker*, 92 Kan. 26, 139 Pac. 1189.

(4) By parol gift.—A parol gift of real property by the husband and wife, for whose benefit a homestead has been declared on the property and is in existence at the time of such gift, may and will be enforced by a court of equity when the circumstances of such a gift are similar to those under which a like gift of real property not impressed with a

homestead will be enforced.—*Kinsell v. Thomas*, 18 Cal. App. 683, 124 Pac. 220. Neither of the spouses can, in law, grant any right in the homestead property without the consent of the other; and neither of them can create an equity therein by parol gift, without the consent of the other. Yet, where it appears that an executed parol gift of a lot thereon was made by the joint act of both husband and wife to their son, for a consideration previously received from him, and also his fencing and improving the same for a home, which he did, at great expense to himself, equity will protect such executed parol gift; and findings and a judgment enforcing them will not be disturbed, notwithstanding a conflict of evidence, where there is sufficient evidence to support the findings.—*Kinsell v. Thomas*, 18 Cal. App. 683, 124 Pac. 220.

(5) **By giving option to purchase.**—Declaration of homestead made by wife with knowledge that her husband had previously given option to purchase to plaintiff was subject to his right to demand a conveyance of the land.—*Smith v. Bangham*, 156 Cal. 359, 28 L. R. A. (N. S.) 522, 104 Pac. 689.

(6) **By bankruptcy proceedings.**—Husband held not estopped by bankruptcy proceedings, judgments, or decrees in wife's bankruptcy proceedings, from asserting such right.—*Blood v. Munn*, 155 Cal. 228, 100 Pac. 694.

(7) **By deed.**—Where a deed to property occupied as a homestead is made by the spouse in whom the legal title is vested, the other not consenting, a conveyance made by the grantee while such occupancy continues will be a nullity, even if made for value to one having no actual notice of the homestead character of the property.—*Cropper v. Goodrich*, 89 Kan. 589, 132 Pac. 163. The separate deed of a married man, the head of a family, to the homestead is void.—*Goldsborough v. Hewitt*, 23 Okla. 66, 138 Am. St. Rep. 795, 99 Pac. 907. Deed of husband alone, made after declaration of such homestead, held void.—*Swan v. Walden*, 156 Cal. 195, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, 103 Pac. 931. A deed of property covered by a homestead for a public highway, in which the husband is the sole grantor, does not purport to transfer or encumber any interest of the wife, and although signed by her, is not good as a dedication by her for the reason that the instrument does not indicate such interest on her part.—*Cordano v. Wright*, 159 Cal. 610, Ann. Cas. 1912C, 1044, 115 Pac. 227. Where husband and wife sign a deed to the homestead of the family under agreement that the same shall not be delivered to the grantee named therein, and the husband, without the consent of the wife, delivers the deed to the grantee, who has notice of the agreement, the deed may be avoided by the wife after the death of her husband.—*Couch v. Eddy*, 35 Okla. 355, 129 Pac. 709. Where it is found that the wife declared a valid homestead upon certain lots occupied by the husband and wife, including certain shares of water used in connection therewith and appurtenant thereto, it follows that the deed of the husband for one-half of

such homestead property and one-half of such water rights to a third person is not only inoperative and ineffectual as a conveyance of any part of the lots described in the declaration of homestead, but is likewise inoperative and ineffectual as a conveyance of any part of the shares of water represented thereby and appurtenant thereto.—*Swan v. Walden*, 19 Cal. App. 127, 124 Pac. 857. Prior to the Oklahoma Act of March 15, 1905, the plaintiff's grantor, a married woman, was vested with title to certain lots not impressed with the homestead character. Said act impressed them as such, the same being built upon and occupied as the home of herself and family. Thereafter the plaintiff in error obtained judgment in a court of record against the plaintiff's grantor, which became a lien on her real property not exempt. Subsequently the plaintiff's grantor, her husband not joining, made to plaintiff a warranty deed to said lots and placed her in possession. Plaintiff in error, to satisfy said judgment, thereupon levied an execution on said lots, to which the husband of plaintiff's grantor after said levy made to plaintiff his separate warranty deed. In an action of plaintiff to clear her title, held that said deed made by plaintiff's grantor was not void and vested in plaintiff the title to said lots, subject to be avoided only by the non-joining spouse; that a failure to avoid said deed by him, after due notice as provided by statute, concluded his right so to do, and that a demurrer to plaintiff's petition setting forth said facts in an action to enjoin a sale under said execution whereby a lien by virtue of said judgment was sought to be enforced, and to clear her title, was properly overruled.—*Love v. Cavett*, 26 Okla. 179, 109 Pac. 553. Where land was purchased by a married woman for a home and after she and her husband had erected a house thereon it was their intention to occupy it as a permanent residence. More than a year before her death the wife alone made a warranty deed of the property. Neither husband nor wife was living on the premises at the time this deed was delivered. The right to a homestead does not consist in purchasing property for a homestead, but in actually occupying it as such.—*Allen v. Shires*, 47 Colo. 433, 107 Pac. 1070. A deed executed and acknowledged by husband and wife as provided by a comparatively early statute of California, was sufficient to pass an easement in a private way which was part of the homestead, where such deed described land conveyed as bounded by such private way.—*Petitpierre v. Maguire*, 155 Cal. 242, 100 Pac. 690. Where the statute provides that one-half of the real estate of which the deceased dies seised shall "belong" to his widow, and the remainder to his child or children, and that the person succeeding to the title of "successors to homesteads" have all the rights of the persons whose interest they acquire, a wife, having minor children by a former, deceased husband, may convey to her second husband less than one-half of the premises set apart to her and her children as a homestead from the estate of her deceased husband.—*McHarry v. Stewart*, 4 Cal. Unrep. 408, 35 Pac. 141, 142, 143.



## REFERENCES.

Power of husband to create easements in homestead without wife's consent.—See note 27 L. R. A. (N. S.) 963.

Validity of conveyance or incumbrance of homestead by wife after abandonment by husband.—See note 36 L. R. A. (N. S.) 1024.

(8) **By mortgage.**—Where the homestead was selected from the separate property of the husband, who joined in its selection as a homestead, title thereto vested in him at the death of his first wife, and, although he marries a second time, he alone may mortgage the homestead without his second wife's signature.—*Dickey v. Gibson*, 113 Cal. 26, 31, 32, 54 Am. St. Rep. 321, 45 Pac. 15. The requirement that the defeasance be acknowledged by husband and wife in the case of an incumbrance upon an existing homestead has no application to a mortgage created before the existence of the homestead.—*First Nat. Bank v. Merrill*, 167 Cal. 392, 139 Pac. 1066. A mortgage executed in the form of an absolute deed upon land upon which a homestead is thereafter declared is not void because the contemporaneous agreement declaring the deed to be a mortgage to secure present indebtedness and future advances is neither signed nor acknowledged by the husband and wife.—*First Nat. Bank v. Merrill*, 167 Cal. 392, 139 Pac. 1066. Where a mortgagee released a non-homestead tract, where the mortgage included both a homestead and a non-homestead tract, and the non-homestead tract was sold in bankruptcy, and the mortgagee received the proceeds of the sale, the mortgagors were entitled to credit for the entire value of the non-homestead tract, but not for both value and amount received from sale.—*Blood v. Munn*, 155 Cal. 228, 100 Pac. 694. A homestead claimant may have his homestead protected and preserved so far as possible when it is covered by a mortgage which also includes other property by requiring other property to be sold and applied upon the debt before a sale of the homestead. Where property has been mortgaged as one tract and is later segregated into homestead and non-homestead property, homestead claimants in respect to the enforcement of a lien, stand in the same situation as a surety for the payment of a debt, and are entitled to demand that non-homestead tract be first sold and applied on the debt. If a creditor without his debtor's consent, releases property so first chargeable, the claimant is entitled to credit of value of same.—*Blood v. Munn*, 155 Cal. 228, 100 Pac. 694. By the weight of authority, a debtor who has mortgaged an existing homestead will be heard, upon a marshaling of securities, to insist that recourse shall last be had to the homestead property, even though by so doing the security of certain creditors upon other lands is impaired or destroyed.—*Nolan v. Nolan*, 155 Cal. 476, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056, 101 Pac. 520. The fact that the mortgage was not recorded until after the filing of the homestead does not make it unenforceable because of the homestead rights.—*First Nat. Bank v. Merrill*, 167 Cal. 392, 139 Pac. 1066. Under the laws

existing in Oklahoma Territory on June 13, 1901, the title to the homestead being in the husband, he having mortgaged the same without being joined by his wife, his rights in such homestead were concluded thereby. But, foreclosure proceedings having been instituted, to which the wife was made a party, by answering and setting up her right therein, it was held that such mortgage could thereby be avoided as to such rights, and foreclosure decreed only against the rights of the husband and subject to all homestead rights of the wife as long as they should exist.—*Malory v. Wm. Cameron Co.*, 29 Okla. 763, 119 Pac. 587. A homestead declaration filed after the execution and filing of a mortgage on the property of a husband as an unmarried man, though after his marriage, is ineffectual as against the mortgage.—*Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153.

(9) *By lease.*—Where in Wyoming a lease, invalid on account of non-compliance with the statutory requirements, was granted of the whole of the premises occupied as a homestead which were of greater value than the statutory limit, the lease will be good for the portion of the property exceeding that limit in value.—*Jones v. Losekamp*, 19 Wyo. 83, 114 Pac. 677. Under section of the Creek Supplemental Agreement approved June 30, 1902, providing that the homestead of citizen allottees shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from date of deed therefor, is subject to the permissive provisions of section 17 following, expressly authorizing Creek citizens to rent their allotments for a period not to exceed five years for agricultural purposes.—*Groom v. Wright*, 30 Okla. 652, 121 Pac. 215. Under the provisions of section 17 of the Creek Supplemental Agreement, approved June 30, 1902, a Creek citizen may rent his homestead allotment for a period of five years for agriculture, but without any stipulation or obligation to renew the same.—*Groom v. Wright*, 30 Okla. 652, 121 Pac. 215.

(10) *By will.*—And if the title to a homestead occupied by husband and wife is in the husband, he may devise the entire property to her by will.—*Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569, 572. In Utah, a husband may, by will, dispose of the homestead property in excess of the homestead limit. If the estate is insolvent, or below the homestead limit in value, the homestead right of the widow attaches; but if the estate is solvent and out of debt, the value of such part of the homestead as may be set apart to the widow should be deducted from her distributive share, unless it clearly appears from the will that the decedent designed the testamentary provision for the widow to be in addition to such share.—*In re Little*, 22 Utah 204, 61 Pac. 899, 901.

(11) *By judicial proceedings.*—The statute of Kansas precluding the maintenance of an action for the specific performance of a contract to sell or exchange a homestead unless the contract for sale is signed by both husband and wife or by an agent authorized in writing by both to make such sale or exchange, is not complied with by depositing a

deed signed by husband and wife with a custodian, to await completion of a pending sale, but who is not authorized to deliver it.—*Martin v. Hush*, 91 Kan. 833, 139 Pac. 401. The fact that the wife was administratrix of her husband's estate, and the homestead property was appraised as a part thereof, and distributed by the decree of distribution in undivided shares to her and to the children of the intestate, is not, as against a mere personal judgment creditor of the wife, a conclusive adjudication of the non-homestead character of the property, and does not estop her from asserting her homestead right to the whole of the property.—*Hart v. Taber*, 161 Cal. 21, 118 Pac. 252. A widow occupying a homestead, the title to which descended to her and her children, can not complain of the forced sale of an adult son's share, and after the minor children have all arrived at the age of majority the purchaser of such share is entitled to partition.—*First Nat. Bank v. Carter*, 81 Kan. 694, 107 Pac. 234.

#### 24. Presentation of claims.

(1) *In general. Purpose of law.*—The evident purpose of the legislature in providing that if there be subsisting liens or encumbrances on the homestead, the claim secured thereby must be presented and allowed, the same as other claims against the estate, was undoubtedly to preserve the homestead estate, if possible.—*Camp v. Grider*, 62 Cal. 20, 26. The general proposition that a mortgage upon the homestead can not be enforced unless a claim therefor had been duly presented to the administrator is settled; but this rule applies exclusively to the property described in the mortgage which is impressed with the character of the homestead. The rule, in California, which requires a mortgage upon the homestead to be presented to the administrator as a claim is based upon the provisions of section 1475 of the Code of Civil Procedure of that state, and is limited to cases in which the homestead does not exceed \$5000 in value, or in which the mortgagee seeks to proceed in foreclosure of his mortgage against the property that is eventually set off as a homestead, where the premises described in the homestead declaration exceed \$5000. It does not apply at all to a probate homestead.—*Bank of Woodland v. Stephens*, 144 Cal. 659, 663, 664, 79 Pac. 379.

#### REFERENCES.

Concerning suits on mortgage claims against homesteads.—See note § 481, post.

(2) *Necessity of presentment.*—Before a suit can be commenced to foreclose a mortgage upon a homestead which was selected and recorded prior to the death of the decedent, it is necessary to present a claim upon the demand against the husband's estate to the executor or administrator of the estate for allowance. This is an exception to the general rule as to mortgages and other liens, and the reason for it is to preserve the homestead, if possible.—*Wise v. Williams*, 88 Cal.

30, 33, 25 Pac. 1064; *McGahey v. Forrest*, 109 Cal. 63, 67, 41 Pac. 817. A mortgage of a homestead on community property must be presented before an action can be maintained thereon for its foreclosure.—*Perkins v. Onyett*, 86 Cal. 348, 350, 24 Pac. 1024; *Bollinger v. Manning*, 79 Cal. 7, 11, 21 Pac. 375; *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26, 24 Pac. 852; *Wise v. Williams*, 88 Cal. 30, 25 Pac. 1064; *Mechanics' B. & L. Assoc. v. King*, 83 Cal. 440, 23 Pac. 376; *Hibernia Sav. & L. Soc. v. Hinz*, 4 Cal. App. 626, 88 Pac. 730, 731. And such presentation is not excused by the fact that the entire estate is homestead property.—*Bollinger v. Manning*, 79 Cal. 7, 11, 21 Pac. 375. Where a homestead has been declared upon the property, it is necessary to present a claim against the husband's estate, notwithstanding a waiver in the complaint in an action of foreclosure of all recourse against the property of the estate other than that mortgaged.—*Wise v. Williams*, 88 Cal. 30, 33, 25 Pac. 1064; *Perkins v. Onyett*, 86 Cal. 348, 24 Pac. 1024. A presentation of a mortgage note without a presentation of the mortgage is insufficient.—*Perkins v. Onyett*, 86 Cal. 348, 350, 24 Pac. 1024. The mortgage of a homestead has no effect upon its character as a homestead, but the property thereby becomes subject to the lien of the mortgage, and during the mortgagor's lifetime is subject to foreclosure and sale in an action by the plaintiff therefor. But upon the mortgagor's death the provisions of section 1475 of the Code of Civil Procedure of California become operative, and require the plaintiff, as holder of the mortgage, to present his claim secured thereby for allowance, as other claims against the estate, and, after the presentation, the plaintiff has the right to have the claim paid out of the general funds of the estate, so far as these funds are available, and to enforce the lien of his mortgage against the homestead for any deficiency remaining after such payment. His failure to make such presentation deprives him of the right to enforce his mortgage for any part of the claim.—*Hibernia Sav. & L. Soc. v. Hinz*, 4 Cal. App. 626, 88 Pac. 730, 731. Where the homestead was declared upon community property, and a judgment is recovered against the owner, it is the duty of the judgment creditors, upon the death of the judgment debtor, to present the judgment to the executor or administrator for allowance, in like manner as any other claim.—*Sanders v. Russell*, 86 Cal. 119, 121, 21 Am. St. Rep. 26, 24 Pac. 852. If a mortgagee neglects to present his claim of mortgage upon a homestead given to secure a note executed by the husband and wife, he not only deprives himself of the right to foreclose the mortgage, but at the same time deprives himself of the right to an action upon the note. And he will not be permitted, without the consent of the mortgagor, to release the mortgage for the purpose of bringing an action upon the note.—*Hibernia Sav. & L. Soc. v. Thornton*, 109 Cal. 427, 429, 50 Am. St. Rep. 52, 42 Pac. 447. If the mortgage covers a homestead upon the separate property of the wife, the mortgagee may foreclose, without presenting a claim against the husband's estate, if he waives

all claims against it.—*Bull v. Coe*, 77 Cal. 54, 63, 11 Am. St. Rep. 235, 18 Pac. 808. If the homestead did not exist at the time of the death of the deceased, but was set apart subsequently by the probate court, it is not necessary to present the mortgage claim if the mortgagee waives all recourse against the decedent's estate, other than the property mortgaged.—*McGahey v. Forrest*, 109 Cal. 63, 68, 41 Pac. 817; *Schadt v. Heppe*, 45 Cal. 433. The rule that a mortgage can be foreclosed without the presentation of a claim against the estate applies to probate homesteads.—*McGahey v. Forrest*, 109 Cal. 63, 41 Pac. 817; *Browne v. Sweet*, 127 Cal. 332, 59 Pac. 774; to a case where a homestead existed at the date of mortgage, but was abandoned before death.—*Bank of Suisun v. Stark*, 106 Cal. 202, 39 Pac. 531; and to mortgages on land given at the time of its purchase.—*Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891. And the settlement and distribution of the estate is no bar to the right to foreclose the mortgage against the distributees of the mortgaged lands, or the grantee of such distributees.—*Dreyfuss v. Giles*, 79 Cal. 409, 21 Pac. 840; and it is immaterial that the action of foreclosure has not been commenced until after the time for the presentation of claims has expired.—*Anglo-Nevada Assur. Corp. v. Nedeau*, 90 Cal. 393, 27 Pac. 302.

(3) *Statute of limitations.*—If a mortgage on a homestead, and the note secured thereby, have been presented to the executor or administrator of the estate, and have been properly allowed, an action against the estate to foreclose the mortgage is not affected by the statute of limitations, pending proceedings for the settlement of the estate.—*Wise v. Williams*, 72 Cal. 544, 548, 14 Pac. 204. If it does not appear what, if any, interest the wife had in the homestead property at the time the mortgage was made, and no claim is presented against her separate estate, the allowance of a claim against the estate of the husband stops the running of the statute of limitations, so far as the wife's rights, as successor of her husband, are concerned.—*Wise v. Williams*, 88 Cal. 30, 35, 25 Pac. 1064. The mortgagee of a homestead must present his claim for allowance, or he can have no deficiency judgment against the estate, but must look only to the mortgaged property; and if he would charge a joint obligor or mortgagor, he must bring his action against him within four years from the maturity of the principal obligation.—*Vandall v. Teague*, 142 Cal. 471, 476, 76 Pac. 35.

25. *Foreclosure without presentment.*—The separate property of a survivor is not a part of the estate of the decedent; and if all demands against the estate are waived, it is not necessary or proper to present a mortgage upon such separate property as a claim against the estate. Whatever may be the nature of the interest which the husband acquires of his wife's separate property by virtue of a homestead, it vests in her at his death. It is not a part of his estate. Hence if a mortgage covers a homestead upon the wife's separate property, and

the creditor waives all claims against the husband's estate, it is not necessary for him to present a claim against such estate before bringing an action to foreclose his mortgage.—*Bull v. Coe*, 77 Cal. 54, 62, 63, 11 Am. St. Rep. 235, 18 Pac. 808; overruling former opinion, 2 Cal. Unrep. 807, 15 Pac. 123. It is not necessary to present a mortgage claim to the executor or administrator for allowance, before bringing suit thereon, if no claim is made against the assets of the estate for a deficiency, and recourse is waived as to any property of the estate of the mortgagor other than that described in the mortgage.—*Schadt v. Heppe*, 45 Cal. 433, 437. The provisions of section 1475 of the Code of Civil Procedure of California do not apply to land which is eventually determined not to be a homestead; and a mortgagee of such lands is not required to present his claim to the executor or administrator as a condition precedent to his right to foreclose the mortgage on the excess.—*Bank of Woodland v. Stephens*, 144 Cal. 659, 664, 79 Pac. 378. So the provisions of section 1475 have no application where a note and mortgage were executed by a husband alone upon community property, where the wife filed a declaration of the homestead upon the land described in the mortgage, but died before the commencement of the action to foreclose, and had not signed the note to the plaintiff, and there was no claim against her estate. The property described in the mortgage, being community property, vested, upon the wife's death, in the husband, as the survivor both of the community and of the homestead. In such a case it is not necessary that any claim should be presented against the wife's estate before the foreclosure of the mortgage.—*Bay City, etc., Assoc. v. Broad*, 136 Cal. 525, 527, 69 Pac. 225. Although a homestead is abandoned before the mortgagor's death, the fact that a homestead exists on the premises at the time the mortgage thereon is executed does not require a presentation of the claim against the estate of the deceased mortgagor. The mortgagee may foreclose without presentment of his claim, where his complaint in foreclosure expressly waives all recourse against any other property than that described in the mortgage.—*Bank of Suisun v. Stark*, 106 Cal. 202, 204, 208, 39 Pac. 531. Property which has ceased to become a homestead is subject to the foreclosure of a mortgage thereon without the presentation of a claim to the executor or administrator.—*Weinreich v. Hensley*, 121 Cal. 647, 656, 54 Pac. 254. If a mortgage is executed by a husband and wife on land a part of which is subject to a homestead declared by him, and upon the death of the husband an insufficient claim of the mortgage indebtedness is allowed by his administrator and approved by the court, and thereafter and subsequent to the death of the wife, under a probate sale in his estate, the entire land is sold subject to the mortgage to the mortgagee, the latter becomes a mortgagee in possession, and in an action by the successors in interest of the wife to quiet their title and recover possession of the land embraced in the homestead, the mortgagee may set up the mortgage

indebtedness and have a foreclosure of the mortgage as to the entire mortgaged premises.—*Raggio v. Palmtag*, 155 Cal. 797, 103 Pac. 312.

#### 26. Liens, enforcement of, and payment.

(1) *In general.*—The court has jurisdiction over the homestead for the purposes specified in the statute, and if the court, from ignorance of the fact that there was a homestead, or by inadvertence or a mistake of law, makes an order not authorized by the statute, its proceedings, however erroneous are not without jurisdiction, and are valid as against a collateral attack.—*Ions v. Harbison*, 112 Cal. 260, 267, 44 Pac. 572. It is proper for the court to set apart a homestead out of or embracing the common property which is subject to a mortgage, and the widow is then in a position to effect a sale of the rest of the property, and the application of the proceeds to the payment of the mortgage, under section 1475 of the Code of Civil Procedure of California, or in case of foreclosure, to ask that the mortgaged property not set apart be first sold, and the proceeds applied, leaving the homestead liable for the remainder only.—*Lord v. Lord*, 65 Cal. 84, 86, 3 Pac. 96. But that section, which makes provision for the extinguishment of liens and encumbrances on homesteads, is limited exclusively to homesteads declared during the lifetime of the spouses. The law has not seen fit to make the same provision as to probate homesteads.—*Estate of Huelsman*, 127 Cal. 275, 277, 59 Pac. 776. The levy of an execution upon homestead property creates no lien, but simply a foundation for proceedings, under the statute, for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order for the partition or sale thereof, and the application of the excess to the satisfaction of the judgment.—*Sanders v. Russell*, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. 852. Valid liens existing on a homestead, created before the death of the head of a family, must be enforced in a court of equity.—*Estate of Orr*, 29 Cal. 101, 104.

(2) *Judgment as lien.*—A judgment becomes a lien upon a homestead, subject to the right of the owners to defeat an execution sale by the filing of a homestead declaration. When the declaration is filed the property becomes a homestead and as such it is exempt from execution or forced sale.—*Snelling v. Butler*, 66 Wash. 165, 119 Pac. 4. A judgment not within the scope of section 1241 of the Civil Code of California, making a homestead subject to execution on certain judgments, creates no lien against the homestead.—*Hohn v. Pauly*, 11 Cal. App. 724, 106 Pac. 266. When a statute exempts a homestead from sale under execution, a judgment, obtained against a homestead debtor after the acquisition of the homestead right, will not create such a lien upon the homestead as can be enforced while it retains its homestead character in the hands of the debtor.—*Hansen v. Jones*, 57 Or. 416, 109 Pac. 869. A husband and wife mutually willed their property, including a homestead, to their survivor for life, with power of dis-

possession, remainder to their children. The property was occupied by the devisors and by the surviving wife until her decease, the children having homes elsewhere and not occupying the land devised: Held, that the children took the land freed from its homestead character, and it could be subjected to the payment of a judgment against the husband, kept alive by revivor against his estate.—*Postlethwaite v. Edson*, 102 Kan. 104, 110, L. R. A. 1918D, 983, 171 Pac. 769. The lien of a judgment is superseded and rendered non-enforceable on lands claimed as a homestead by the filing of the homestead declaration.—*Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 393, following *Snelling v. Butler*, 66 Wash. 165, 119 Pac. 3. The homestead allotment of a deceased Creek freedwoman is protected by the Oklahoma constitution, and is not subject to the payment of any debt or liability contracted by her previous to her death, and could not be liable for any charge, lien, or obligation, except such as the constitution and the laws relating to liens upon homesteads provide.—*In re Jameson's Estate*, — (Okla.) —, 182 Pac. 518, 521. After a judgment lien has attached to real estate it can not be divested by its occupancy for homestead purposes.—*Northwest Thresher Co. v. McCarroll*, 30 Okla. 25, Ann. Cas. 1913B, 1145, 118 Pac. 352.

## REFERENCES.

Whether homestead exemption attaches to the surplus upon foreclosure of a lien paramount to the homestead right.—See note 18 L. R. A. (N. S.) 491.

27. **Purchase-money mortgage. Priority.**—In the absence of a statutory provision exempting purchase-money obligations from the exemption laws, it is a principle of equity that a purchase-money mortgage given at the same time as the deed, or as a part of the same transaction, has precedence over any prior general liens, and that for the same reason which gives it that precedence it is superior to the homestead right of the mortgagor. And that is so although the wife or husband of the vendee does not join in the execution of the mortgage, or the right of homestead is not expressly waived or released by a recital to that effect in the mortgage.—*Powers v. Pense*, 20 Wyo. 327, 40 L. R. A. (N. S.) 785, 123 Pac. 925, 928.

28. **Vendor's lien. Priority of equity of.**—Where one held vendor's lien on N. place which was subordinated to claims of subsequent mortgage on N. place, which mortgage also covered K. place, after-declared homestead upon K. place did not entitle debtor to have N. place first sold to satisfy mortgage, but equity of vendor's lien being prior to equity of after-declared homestead on K. place, vendor was entitled to have K. place first sold to satisfy mortgage.—*Nolan v. Nolan*, 155 Cal. 476, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056, 101 Pac. 520.

29. **Mechanics' liens.**—Under the laws of Oregon a homestead is not subject to a mechanic's lien.—*Davis v. Low*, 66 Or. 599, 135 Pac. 314, 315. A mechanic's lien having attached before a declaration of



homestead was made and filed, the lien takes precedence of the homestead.—*Olson v. Goodsell*, 56 Wash. 251, 105 Pac. 463.

30. Termination of right. (1) In general.—If the survivor, in whom a homestead is vested, afterwards mortgages it and dies, there is no presumption that no family is left surviving and that the homestead exemption has terminated. The burden of proof of those facts is upon the holder of a mortgage who asserts them.—*Hibernia Sav. & L. Soc. v. Hinz*, 4 Cal. App. 626, 88 Pac. 730, 731. The death of the husband does not affect the homestead character of property selected by him, in his lifetime, from his separate estate as a homestead, but such homestead character continues so long as the property remains a homestead. It ceases, however, upon the death of his wife, leaving no minor child, for then there is no family for whose benefit the exemption exists; and if she dies intestate, the property passes to her heirs, under the laws of succession.—*Estate of Fath*, 132 Cal. 609, 612, 64 Pac. 995. If the homestead was selected from the separate estate of a spouse, without the owner's consent, the property, upon the death of the owner, ceases to have the incidents of a homestead, and vests in his heirs, free from any such limitation, unless it is afterwards selected and set apart as a homestead by an order of the court.—*Weinreich v. Hensley*, 121 Cal. 647, 655, 54 Pac. 254. Where the husband remarried, and the record shows no second homestead in favor of the second wife, the former homestead, as such, could not inure to her benefit.—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

(2) By divorce proceedings.—Where a homestead was declared by a husband upon his separate property for the benefit of himself and wife, and he subsequently obtained a divorce from the wife, in which proceeding no order was made assigning the homestead to the wife for a "limited period," as provided in subdivision 4 of section 146 of the Civil Code of California, her rights in the homestead were absolutely terminated upon the entry of the final decree of divorce in favor of the husband. If the wife's rights are not reserved in the decree, they are destroyed forever.—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989. Where the wife made no appearance in a divorce suit brought against her by her husband, and allowed judgment to be entered upon her default, it may be assumed that the evidence must have disclosed that she was not entitled to consideration as one to whom the homestead should be assigned "for a limited period."—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989. Where a decree of divorce is silent as to the homestead, it is to be presumed that at the time of granting the divorce it made no order with reference to the homestead, neither assigning it to the "former owner" of the property, nor to the wife "for a limited period."—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989. When a wife, after the divorce, seeks to assert any claim to any part of the husband's property, homestead, or otherwise, she must establish that right by the decree, or by a valid contract between her-

self and husband.—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989. In an action by the administrator of the divorced wife of deceased to quiet her title to the homestead as surviving spouse, the court properly excluded the declaration of homestead in her favor, and granted a nonsuit as to defendants.—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989. The homestead having been selected from the husband's separate property, when the wife's interest therein terminated by a decree of divorce, no order of court was necessary to revest the whole interest in the divorced husband when the wife's interest therein had ceased, but the whole homestead ceased as to that family, and the property remained in the former owner, freed and unincumbered by any claim of the former wife.—*Zanone v. Sprague*, 16 Cal. App. 333, 116 Pac. 989.

31. *Partition of homestead.*—The estate in land set apart for a limited period out of the separate estate of a decedent as a homestead vests in those declared by the statute to be entitled to it, but subject to the assignment of such homestead by the court, and, at the expiration of the time limited for its existence, is subject to partition as though no homestead had been created.—*McHarry v. Stewart*, 4 Cal. Unrep. 408, 35 Pac. 141, 142. So long as the homestead is occupied by the family of the deceased, and until the widow again marries, or the children arrive at the age of majority, no partition of the homestead can be made.—*Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537, 547. But where a widow, the head of a family, occupies certain real estate as a homestead, and dies intestate, leaving heirs, some of whom are minor children, who continue to reside upon and to occupy said homestead as a residence, such residence is not exempt from partition, for the reason that all of the children of said widow have not arrived at the age of majority.—*Martell v. Trumbly*, 9 Kan. App. 364, 58 Pac. 120.

## II. PROBATE HOMESTEADS.

1. *In general.*—Where no homestead has been selected and recorded during the lifetime of the decedent, it is the duty of the court to designate and set apart a homestead out of the community property, if any there be, and if not, then out of the separate property of the decedent.—*Estate of Davis*, 69 Cal. 458, 10 Pac. 671; *Estate of Lahiff*, 86 Cal. 151, 153, 24 Pac. 850; and it may be done from any property suitable for the purposes.—*Estate of Sharp*, 78 Cal. 483, 21 Pac. 182. If there are no minor children, then the homestead is for the surviving wife or husband alone.—*Estate of Lahiff*, 86 Cal. 151, 153, 24 Pac. 850; but if taken from the separate property of the decedent, it can be for only a limited period.—*Estate of Lahiff*, 86 Cal. 151, 153, 24 Pac. 850. The statute authorizing the court to set aside all property exempt from execution, including the homestead, authorizes the setting aside of the homestead in connection with and in addition to the personal property exempt from execution.—*Estate of Busse*, 35 Cal. 310, 314, 315; and the insolvency of an estate does not prevent a court

from setting apart a probate homestead.—*Estate of Adams*, 128 Cal. 380, 57 Pac. 569. If a husband dies, and his widow, in ignorance of her right to a homestead, joins in a transfer of the property, and afterwards purchases it herself, this is not evidence of any abandonment of her homestead right, and she is entitled to have the property set aside to her as a homestead.—*Smith v. Ferry*, 43 Wash. 460, 86 Pac. 658. A stranger is not entitled to enter into possession of homestead premises as a tenant in common and interfere with the occupancy and control by the homestead claimants, as this would be inconsistent with the very nature of a homestead, and violative of the very purpose for which homesteads are created; namely, to secure a home for those clothed with a homestead right,—to each and all of them.—*Moore v. Hoffman*, 125 Cal. 90, 92, 73 Am. St. Rep. 27, 57 Pac. 769. If a homestead is set apart to the widow out of her deceased husband's separate estate, the interest of his heirs in remainder is liable for debts against the estate, or charges against it, such as a family allowance made in favor of the widow. The statute was not designed to effect a statutory distribution of the estate so as to place it beyond the reach of creditors.—*Estate of Tittel*, 139 Cal. 149, 150, 153, 72 Pac. 909.

#### REFERENCES.

Homestead in decedents' estates.—See note 44 L. R. A. 402.

2. **Definition of homestead.**—Where the statute authorizing the court to set apart a probate homestead for the use of the widow and children does not define such homestead, resort must be had to the general law for such definition. The homestead represents the dwelling-house at which the family reside, with the usual and customary appurtenances, including out-buildings of every kind necessary or convenient for family use, and lands used for the purpose thereof. If situated in the country, it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks. In either case, it is unlimited by extent, and is not circumscribed by fences. It need not be in a compact body; on the contrary, it may be intersected by highways, streets, or alleys. In respect to quantity, by itself considered, it is unlimited, whether in town or country. In short, the only tests are use and value. Whatever is used—being necessary or convenient—as a place of residence for the family, as contradistinguished from a place of business, constitutes a homestead. If, however, it is also used as the place of business by the family, as frequently happens, it may not therefore cease to be a homestead, if it would be necessary or convenient for family use, independently of the business. The homestead, and the tests by which it is ascertained, are the same, whether the question arises between those claiming the homestead, or one of them and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife. There is not one homestead as against a creditor, and a different one when the survivor asserts his or her claims as against the heirs of the deceased.

—*Gregg v. Bostwick*, 33 Cal. 220, 227, 91 Am. Dec. 637; *Estate of Delaney*, 37 Cal. 176, 179; *Keyes v. Cyrus*, 100 Cal. 322, 324, 38 Am. St. Rep. 296, 34 Pac. 722; *Estate of Garrity*, 108 Cal. 463, 468, 38 Pac. 628, 41 Pac. 485; *Moore v. Hoffman*, 125 Cal. 90, 92, 73 Am. St. Rep. 27, 57 Pac. 769. A probate homestead differs from the case of a homestead created during the existence of the community by a compliance with the statute, the title to which vests in the survivor.—*Estate of Boland*, 43 Cal. 640, 642.

3. *Residence not essential.*—It is not essential to the validity of a homestead set apart to the surviving husband or wife, by order of the court, that the property be actually occupied at the time when the order is made.—*Estate of Noah*, 73 Cal. 590, 592, 2 Am. St. Rep. 834, 15 Pac. 290. Nor does the court make it requisite that the deceased should have resided on the property at the time of his death in order that the court may set apart a homestead for the use of the family, but authorizes the court to set apart any portion of the estate which is suitable for a homestead.—*Estate of Pohlmann*, 2 Cal. App. 360, 84 Pac. 354, 355; *Estate of Bowman*, 69 Cal. 244, 10 Pac. 412. An unexecuted and conditional intent to fit a place for residence is not sufficient to justify a court in setting it apart as a probate homestead under section 1465 of the Code of Civil Procedure.—*Estate of Faber*, 168 Cal. 491, 143 Pac. 737.

4. *Purpose and construction of statute.* Mandatory nature of proceeding.—The word "may," in public statutes, is often used for "must," or "shall," and is construed imperatively; and the statute which directs that the court "may," on its own motion, or on petition, "set apart" for the use of the family all property exempt from execution including the homestead is to be construed as "shall," and the court has no discretion to refuse the application. It was not intended to leave to the court's discretion the question whether or not the personal property exempt by law from execution, or the homestead selected under the provision of the general homestead law, should be set apart; and there is no more reason to suppose that it was intended he should exercise a discretion in reference to setting apart a probate homestead. The statute is mandatory in its nature.—*Estate of Ballentine*, 45 Cal. 696, 699; *Estate of Wixom*, 35 Cal. 320, 323; *Estate of Davis*, 69 Cal. 458, 10 Pac. 671; *Kearney v. Kearney*, 72 Cal. 591, 15 Pac. 769; *Demartin v. Demartin*, 85 Cal. 71, 75, 24 Pac. 594; *Estate of Lahiff*, 86 Cal. 151, 153, 24 Pac. 850. Under the statute of Utah, the widow and minor child are entitled to a homestead of the value of two thousand two hundred and fifty dollars out of the real property of the estate, and to all of the exempt personal property of decedent.—*In re Syndergaard's Estate*, 31 Utah 490, 88 Pac. 616, 617. It is only in cases where the court sets apart a homestead for a limited period that it can exercise discretion.—See subd. 16, *infra*, "Limited Homestead." The fact that a widow, after the death of her husband, gives a quitclaim

deed is no ground for refusing to set apart to her as a homestead, from the separate property of her deceased husband, a portion of the land conveyed by such deed.—*Estate of Moore*, 57 Cal. 437, 443. Section 1485 of the Code of Civil Procedure of California does not apply to probate homesteads.—*Estate of Moore*, 57 Cal. 437, 443; and section 1465 of the same code purports to deal merely with the descent of the property from which the homestead was selected; but the power of the court to assign the homestead, and upon whose exercise a limitation upon the estate of the heirs is created, is given in the section last named, and the provisions of the latter section are to be read in connection with the provisions of section 1474 of the same code.—*Weinreich v. Hensley*, 121 Cal. 647, 653, 54 Pac. 254. A declaration of homestead, without the statutory acknowledgement, is not valid as against an execution.—*Covert v. Burger*, 76 Wash. 454, 456, 136 Pac. 675. It was the purpose of the act of 1895, Rem. & Bal. Code, § 558, of the state of Washington, to fix title in the community, and, on the death of either spouse, in the survivor; that act superseded all that part of section 1468, Rem. & Bal. Code, which vested any title in a child or children; a husband may, therefore, after his wife's death, select a homestead from community property for the benefit of himself and family.—*Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659. The statute that allows a surviving husband to select a homestead out of community property, without any judicial proceedings, does not deprive the deceased wife's heirs of property without due process of law.—*Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659, 88 Wash. 700, 153 Pac. 20. The statute of Washington, in so far as it deals with the right to select a homestead after the death of a spouse, refers to real property.—*Scott v. Stark (Watson)*, 75 Wash. 610, 615, 135 Pac. 643. There is no homestead right in any specific property until it is selected, and such selection evidenced in writing and recorded, as provided by the statute.—*Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, Ann. Cas. 1917E, 739, 151 Pac. 803.

5. Right paramount to testamentary disposition.—The right of the widow of a decedent, and of his minor children, to have a probate homestead set apart to them out of the estate is paramount to that of testamentary disposition. Thus, although a farm had been specifically devised, one-half to the widow and the other half to the children, it is competent for the probate court to set it aside as a homestead, for the right of a testator to devise is subordinate to the power in the probate court to sequester and set apart the property for the shelter, care, and support of the family.—*Estate of Huelsman*, 127 Cal. 275, 59 Pac. 776. The power of testamentary disposition of property as conferred and defined by the statute is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts of the estate.—*Sulzberger v. Sulzberger*, 50 Cal. 385, 387.

The power or duty of the court to set aside a probate homestead is not limited by the fact that the decedent left a will by which he disposed of the property sought to be set aside.—*In re Davis*, 69 Cal. 458, 460 10 Pac. 671. Homestead and family allowance set apart by order of probate court is not derived by will, though beneficiaries be devisees and legatees thereunder, and is not subject to inheritance tax.—*In re Kennedy's Estate*, 157 Cal. 517, 29 L. R. A. (N. S.) 428, 108 Pac. 280. Specific devise of property will not defeat power of probate court to set it apart as homestead for surviving family.—*In re Kennedy's Estate*, 157 Cal. 517, 29 L. R. A. (N. S.) 428, 108 Pac. 280. Right to make testamentary disposition of homestead.—See note, 21 Ann. Cas. 248.

6. Application. Jurisdiction.—It is not for a court of law, in an action of ejectment, to set apart premises as a homestead; that function appertains to a court sitting in probate in the matter of the estate of the deceased.—*Richards v. Wetmore*, 66 Cal. 365, 366, 5 Pac. 620. When the surviving wife petitions to have the homestead set off to her, it ought to be shown what the homestead was at the time of the husband's death.—*Estate of Delaney*, 37 Cal. 176, 182. The obvious purpose of the statute is to provide the family of the deceased with a home, where they may live and be protected as against creditors and heirs; and it is made the duty of the court to select and set apart for that home such part of the estate, consisting of a dwelling-house, and the land on which the same is situated, as, in view of the value of the estate and all the circumstances surrounding it, shall seem just and proper. The court is not bound by the wishes of the applicant, but should exercise its own discretion or good judgment; and unless that discretion is abused, its action will not be disturbed on appeal.—*Estate of Schmidt*, 94 Cal. 334, 337, 29 Pac. 714. It is immaterial, however, whether the probate court acts on petition or on its own motion in setting apart a homestead to the widow, or widow and children, where no homestead had been selected and recorded during the decedent's lifetime.—*Bullerdich v. Hermsmeyer*, 32 Mont. 541, 81 Pac. 334. The guardian of a minor has authority to petition the court to set apart a homestead to such minor.—*Estate of Pohlmann*, 2 Cal. App. 360, 84 Pac. 354, 356. The jurisdiction of a probate court to set aside a homestead to the surviving wife is not subject to the condition that she does not have any other property, or any other property suitable for a home. Such jurisdiction is excluded only when she has already a legal homestead, and a mere place fit to reside in is not a homestead, unless it has been impressed with that character by certain acts required by law to be done for that purpose. The power and duty of the court to set apart the homestead is not, in any part of the statutory law, limited to a case where the widow has no other property; and if she has other property, it matters not how she obtained it, whether under her husband's will or otherwise. Her right to a probate homestead is an independent right, which she has in addition to any other right of property which she may have.—*Estate of Firth*, 145 Cal. 236,

78 Pac. 643, 644. On an application of a surviving widow to have a probate homestead set apart to her, and where the only question involved is whether or not she should have the homestead, the adjudication should be limited to that question; and the court has no jurisdiction to undertake to adjudicate heirship. That is a question which should be determined in an appropriate action or proceeding in which the issue of heirship properly arises.—Estate of Firth, 145 Cal. 236, 78 Pac. 643, 645. After the court has set apart community property as a homestead to the widow, it has no further jurisdiction over it for any purpose of distribution.—Estate of Gilmore, 81 Cal. 240, 243, 22 Pac. 655. Application for a homestead may be made upon the return of the inventory, or at any subsequent time during the administration. The application does not come too late if made before the administration of the estate is closed.—Estate of Still, 117 Cal. 509, 49 Pac. 463, 465. The power of the court to set aside a homestead is not defeated by the action of the executor in negotiating a sale which is unconfirmed, before the decree setting apart the homestead is made.—Estate of Lahiff, 86 Cal. 151, 154, 24 Pac. 850. An order setting apart property absolutely to a surviving husband in the administration of the estate of his deceased wife is without jurisdiction, where the property is found to belong to the community.—Estate of Klumpke, 167 Cal. 415, 139 Pac. 1062. In settling up the estate of a decedent, and setting apart a homestead, the court is dealing only with the property of the estate. It has no jurisdiction, in a proceeding of this character, to determine the title to the property, or the validity of any claim of title adverse to that of the estate.—In re Nicoll's Estate, 164 Cal. 368, 129 Pac. 278, 280. The superior court is a court of general jurisdiction, and has, under section 1465 of the Code of Civil Procedure of California, power to set aside a homestead for the benefit of a surviving wife. The petition and notice are the jurisdictional prerequisites of action by the court, and the court, having acquired jurisdiction, its decree is not void because of errors committed in the exercise of the jurisdiction. The judgment is in rem and is conclusive upon creditors.—Estate of Bette, 171 Cal. 583, 153 Pac. 949.

7. How to be selected.—If no homestead has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, the homestead, for the use of the surviving husband or wife and the minor children, out of the common property, or if there be no common property, then out of the separate property belonging to the decedent. The selection must be made from the common property, if there be any; it can be made from the separate property only in case there be no common property. The statute, in this regard, is clear and explicit, and admits of no question.—Lord v. Lord, 65 Cal. 84, 86, 3 Pac. 96; Estate of Lahiff, 86 Cal. 151, 24 Pac. 850; Estate of Schmidt, 94 Cal. 334, 29 Pac. 714; Weinreich v. Hensley,

121 Cal. 647, 54 Pac. 254. It is to be observed in this connection, however, that if the homestead is selected out of the separate estate of the decedent it is "subject to the power of the superior court to assign it for a limited period to the family of the decedent." It can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order. This is so in California because the provision in section 1468 of the Code of Civil Procedure of that state, which provides that "if the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased subject to such order," has been held to apply to probate homesteads selected and set apart by the court.—*Estate of Schmidt*, 94 Cal. 334, 29 Pac. 714; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Estate of Lahiff*, 86 Cal. 151, 24 Pac. 850; and see *infra*, subd. 16, "Limited Homestead." But it is only in cases where a homestead is set apart from the separate property of the deceased that it is required to be for a limited period.—*Phelan v. Smith*, 100 Cal. 158, 170, 34 Pac. 667. Where, on the death of a married man, the dwelling in which the pair had lived together is proposed to be set aside to the widow absolutely as a homestead, the presumption is that the property is community property, although this may be overcome by evidence.—*Estate of Pickard*, 169 Cal. 162, 146 Pac. 425.

8. *Procedure and practice.*—The code does not point out the steps to be pursued in setting apart a homestead, where none has been declared by the husband and wife, or one of them, during the lives of the parties, and in such cases the court may adopt any suitable method of procedure conformable to the spirit of the code.—*Phelan v. Smith*, 100 Cal. 158, 169, 34 Pac. 667. In a proceeding to set apart a homestead to the widow and children of the decedent, title may be examined, but can not be tried. That should be determined in some appropriate action brought for the purpose of settling the question. The question of the validity of adverse title claimed by contestants in the property sought to be set apart as a homestead is not proper to be litigated in such a proceeding.—*Chalmers v. Stockton B. & L. Soc.*, 64 Cal. 77, 28 Pac. 59; *Estate of Burton*, 64 Cal. 428, 1 Pac. 702; *Estate of Groomes*, 94 Cal. 69, 72, 29 Pac. 487; *Estate of Kimberly*, 97 Cal. 281, 32 Pac. 234; *Dickey v. Gibson*, 121 Cal. 276, 53 Pac. 704. The court will not pass upon the validity of mortgages upon the homestead property.—*Chalmers v. Stockton B. & L. Soc.*, 64 Cal. 77, 78, 28 Pac. 59. In the regular course of procedure, a homestead should be set apart at once upon the coming in of the inventory showing its existence, but, if not then done, it may be done at any subsequent time during administration. When thus set apart, it is properly withdrawn from administration, and the administrator has no further concern in it.—*Estate of Still*, 117 Cal. 509, 49 Pac. 463, 465. The purpose of section 1465, Rem. & Bal. Code of the state of Washington, was to give a widow and minor children



the benefit of a homestead when none had been claimed by "the head of a family in his lifetime," but all parts of that section which required a "setting aside" were superseded by the act of 1895, Rem. & Bal. Code, § 558, which makes the act of declaring a homestead a matter entirely independent of any proceeding in court, either before or after declaration.—*Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659; affirmed in 88 Wash. 700, 153 Pac. 20.

9. Appraisement.—The statute of the state of Washington does not seem to require appraisers, in a proceeding to set aside certain property of an intestate as a homestead to his widow, where there is no evidence that the property is worth more than \$1700.—*Smith v. Ferry*, 43 Wash. 460, 86 Pac. 658, 659.

10. Property subject to.—It is expressed in some of the older cases that no property could be set apart as a probate homestead which could not have been dedicated as such under the homestead act immediately preceding the death of the deceased and during the continuance of the marriage of the spouses; and residence on the property was considered a prerequisite to the filing of a homestead thereon.—*Estate of Noah*, 73 Cal. 590, 2 Am. St. Rep. 834, 15 Pac. 290; *Estate of Ackerman*, 80 Cal. 208, 13 Am. St. Rep. 116, 22 Pac. 141; *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358; *Estate of Carriger*, 107 Cal. 618, 40 Pac. 1032; *In re McVay's Estate*, 14 Ida. 56, 64, 93 Pac. 28, 31. But the expression, used in some of those cases, to the effect that a probate homestead can be set apart only on property which could have been dedicated under the homestead act, immediately preceding the death of the husband, must be construed to mean only that it must be property which in its character is homestead property,—that is, a dwelling-house, with the land on which it is situated, and which could have been occupied as a home,—and not that it must be land on which the husband actually resided at the time of his death. In the case of a probate homestead, the court creates the homestead, and it may be carved out of any property of the estate suitable for a homestead.—*Estate of Gallagher*, 134 Cal. 96, 97, 66 Pac. 70; *Estate of Lahiff*, 86 Cal. 151, 24 Pac. 850. The code does not make it requisite that the deceased should have resided on the property at the time of his death, in order that the court may set apart a homestead for the use of the family, but authorizes the court to set apart any portion of the estate which is suitable for a homestead.—*Estate of Pohlmann*, 2 Cal. App. 360, 362, 84 Pac. 354. If property is suitable and proper for a homestead, it may be set apart as a probate homestead, although it had previously been used exclusively for business purposes.—*Estate of Sharp*, 78 Cal. 483, 485, 21 Pac. 182. It has been held that property consisting of a four-story brick building of the value of \$2500, and which was erected and occupied exclusively for business purposes, could not be set apart as a probate homestead.—*Estate of Noah*, 73 Cal. 590, 2 Am. St. Rep. 834, 15 Pac. 290. But if a building is the actual bona fide residence

of a party, he may legally select it, and the land on which it is situated, as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than those of a family residence; and this is not in conflict with the equally well-settled doctrine, that the use of the property is an important element to be considered, and that where the building is occupied by the claimant primarily for other purposes than those of residence, the occupancy of a portion thereof by him and his family being for the purpose of conducting a business therein, and but incidental to the business, the property cannot be legally selected as a homestead. In no case has it been decided that where a portion of the building is dedicated to residence purposes, and is actually occupied by the claimant as the home of himself and his family, and such occupation is not merely incidental to the carrying on of some business in other parts of the building, the building, and the land on which it is situated, can not be legally selected as a homestead.—*Estate of Levy*, 141 Cal. 646, 650, 99 Am. St. Rep. 92, 75 Pac. 301. It may be true that where two or more buildings suitable for dwelling-house purposes, belonging to the claimant, are situated upon the same parcel of land, and the claimant resides in one, he can legally select but one as a homestead. But cases of this kind are distinguishable from the case of a single building. Thus where an entire building is composed of three flats, one of the floors being actually occupied as the family home, the occupation being solely for the purpose of such a home, and not merely incidental to some other purpose, and the place so occupied is an integral part of the land on which the building stands, the fact that the dwelling contains two other stories, so constructed that they are more adapted for renting purposes, being built with separate street entrances, can not impair the right of the claimant to select as a homestead the building and all of the land on which it stands. While the floors of such a building may constitute separate dwelling-places, there is but one building incapable of division, and the form of the construction of the building is immaterial.—*Estate of Levy*, 141 Cal. 646, 651, 99 Am. St. Rep. 92, 75 Pac. 301. The court in the administration of the estate of a decedent can not set apart lands of the estate as a probate homestead, unless they were lands upon which a homestead could have been impressed in the lifetime of the deceased.—*Estate of Davidson*, 159 Cal. 98, 115 Pac. 49. The provision of section 1465 of the code of Civil Procedure of California as to the setting apart of a homestead from the common property can be read only as meaning such common property as is a part of the estate under administration, and consequently within the jurisdiction of the court in probate, as in the case of a deceased husband leaving community property.—*Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062. The superior court sitting as a court in probate has no power under section 1465 of the Code of Civil Procedure of California in an administration upon the estate of a wife, to select and set apart a homestead to the surviving husband out of what was com-

munity property of the spouses, where no homestead was selected during their lives, or to select and set apart such a homestead from any property other than the separate property of the wife.—*Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062. If the lot does not exceed in size the statutory limit, the fact that the building on it is an apartment house is no reason why the property should not be set apart as the widow's homestead; provided she and her husband had lived in it up to the period of his death and it is part of his estate.—*Estate of Pickard*, 169 Cal. 162, 146 Pac. 425.

#### REFERENCES.

Right to claim homestead in property used as a hotel or boarding house.—See note 41 L. R. A. (N. S.) 303.

11. *Property not subject to.*—A widow died testate, and left surviving her several children, none of whom were minors. By her will, the property was divided among her children, and the home place, on which she had resided many years, was given to a son, who did not reside therein, and who did not claim the same as a homestead. For some time before her death a married daughter, and also a granddaughter, lived with her, and after her death they continued to occupy the home place, claiming a homestead right therein. The language of the will, giving the property to the son, imported a complete transfer of ownership to him; but in another clause she recommended him to keep the home, so that if any of her children should become homeless it might be a refuge for them. On the claim of a homestead, it was held that the complete title to the land passed to the son, and that the daughter and granddaughter had no interest in the land to which the homestead right could attach.—*Hartman v. Armstrong*, 59 Kan. 696, 54 Pac. 1046. Partnership property can not be set apart by the probate court as a homestead to the widow of the deceased member of the firm.—*Kingsley v. Kingsley*, 39 Cal. 665, 667. Nor can property held by the decedent as a tenant in common be set aside as a probate homestead.—*Estate of Carriger*, 107 Cal. 618, 621, 40 Pac. 1032. Lands held in joint tenancy are not subject to a probate homestead.—*Cameto v. Dupuy*, 47 Cal. 79, 80. Nor can such a homestead be set apart out of farming land upon which there is no dwelling, and which had not been lawfully claimed as a homestead, and upon which no one resided at the time of the husband's death, such premises not being suitable for a homestead. The fact that the deceased and his widow had, many years before the application for a homestead, resided on the lands involved, in a dwelling house which stood thereon; that such dwelling house and contents had been destroyed by fire; and that both husband and wife had resided elsewhere,—does not affect the legal question presented, where no other dwelling house was ever built on the land, and where it was not in any way, after the fire, occupied as a home.—*Estate of Gallagher*, 134 Cal. 96, 98, 66 Pac. 70. A probate homestead can not be taken from tracts of land widely separated. If separate

parcels of land are selected as a homestead, and such selection may perhaps be made, they must, at least, be so near together that they can be occupied and used for the purposes of a homestead; and in this respect there is no difference between a homestead set apart by the court, and one selected under the homestead law.—*Estate of Armstrong*, 80 Cal. 71, 74, 22 Pac. 79. A homestead can not be created out of land held by the applicant as a tenant in common with others; but where a widow has no title as tenant in common in community property, which, during the administration of the estate, is subject to a probate homestead, her infant son is entitled, upon application, to have a homestead therein set apart to him.—*Estate of Still*, 117 Cal. 509, 516, 49 Pac. 463, 465. Under both the early homestead acts, and the present code provisions respecting homesteads, a homestead can not be created by one joint tenant in lands held in joint tenancy or as tenants in common, except as authorized by the act of 1868 (Stats. 1868, p. 116), which provides that a homestead may be declared upon land of a cotenancy where the declarant is in the exclusive occupation of it and residing thereon.—*Estate of Davidson*, 159 Cal. 98, 115 Pac. 49. A lot in a city, having no improvements upon it except two small buildings, each of which was unfit for a dwelling place—one of them being scarcely large enough to inclose an ordinary buggy, and the other being used as a garage—can not be set aside as a probate homestead to the widow of a decedent, notwithstanding evidence tending to show that the decedent prior to his death, intended to build a dwelling house on the lot, and had made indefinite plans for its erection.—*Estate of Faber*, 168 Cal. 491, 143 Pac. 737. After the death of the husband, the probate court can not set apart to the wife as a homestead the mere undivided interest of the husband in the cotenancy property, leaving her own undivided interest therein unimpressed with the homestead characteristics.—*Estate of Davidson*, 159 Cal. 98, 115 Pac. 49. The court as a probate court has no jurisdiction to set apart property as a homestead where the same is alleged in the petition therefor to be the separate property of the petitioner.—*Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062. The court in the administration of the estate of a decedent can not set apart lands of the estate as a probate homestead, unless they were lands upon which homestead could have been impressed in the lifetime of the deceased.—*Estate of Davidson*, 159 Cal. 98, 115 Pac. 49. The right of a surviving wife to a probate homestead is an independent right which she has in addition to any other right of property which the law gives her, whether acquired under her husband's will or otherwise.—*Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623.

**12. Widow's right. In general.**—The power and duty of the court to set apart a probate homestead is not limited to a case where the widow has no other property. Her right to a probate homestead is an independent right, which she has in addition to any other right or property which she may have.—*Estate of Firth*, 145 Cal. 236, 78 Pac. 643,

644. Although a widow marries after she had a probate homestead set apart to her out of the estate of her deceased husband, she may claim a homestead out of the estate of her second husband.—*Higgins v. Higgins*, 46 Cal. 259, 265. A widow to whom a probate homestead has been set aside may maintain an action to quiet title thereto.—*McKinnie v. Shaffer*, 74 Cal. 614, 16 Pac. 509; or ejectment against the administrator of her deceased husband.—*Moore v. Moore*, 4 Cal. Unrep. 190, 34 Pac. 90. The widow of a deceased partner is not entitled to a homestead out of the partnership property.—*Kingsley v. Kingsley*, 39 Cal. 665, 667. If a widow marries before an order of the probate court setting apart to her a probate homestead, she loses, by her marriage, the right to such homestead.—*Estate of Boland*, 43 Cal. 640. If a wife, supposing her husband to be dead, marries a second time, she can not claim a probate homestead in the estate of her former husband, as his widow, until the second marriage has been annulled by a competent tribunal. The second marriage is valid until so annulled.—*Estate of Harrington*, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000. And a widow, who has never resided in the state, is not entitled to a probate homestead, where the statute provides that all of the property exempt from execution, including the homestead, of a decedent, who leaves a widow residing in the state, shall be set apart for her use. "It is not questioned," said the court, "that the widow, in some cases, may be entitled to the homestead, although she was absent at the time of her husband's death, and although she may never have been upon the premises claimed, or within the borders of the state; but it is not so where she voluntarily ceased to be a member of her husband's family, and, by her own preference, made her home elsewhere." "The petitioner," said the court, "was never a member of the family or household of the deceased in this state, and this was, as a matter of fact, never her home or residence. Upon the contrary, she persistently, and in terms, refused to reside here or to make this her home."—*Ullman v. Abbott*, 10 Wyo. 87, 67 Pac. 467, 470. After an order of sale of real estate to pay the expenses of the last sickness, etc., is made, the court can not properly set apart the same real estate to the widow as a homestead, where the expenses were a proper charge against the estate, and could only be realized and paid from the proceeds of the sale of the property; and, under the circumstances, no error is made in refusing to set aside the homestead to the widow.—*In re Thorn's Estate*, 24 Utah, 209, 67 Pac. 22.

13. *Widow's right.* How not affected.—A widow is entitled to a probate homestead, although there are no minor children.—*Estate of Armstrong*, 80 Cal. 71, 22 Pac. 79. She is also entitled to one, though she has other property.—*Estate of Firth*, 145 Cal. 236, 78 Pac. 643. Although a widow grants all of her individual estate in a tract of land, which was community property, the grantee takes the property subject to have the land set apart as a homestead for the widow and minor children, and he cannot defeat the homestead right by asserting his right

to take as a tenant in common. The right to have a probate homestead carved out of the estate is inherent, not in her alone, but in the children as well, and she can no more foreclose their right thereto than she can their rights as heirs to the estate. To say that the widow may convey her right to such a homestead, and that the grantee takes as a tenant in common with the children, is, in effect, to say there shall be no homestead. The law consecrates the homestead to a specific purpose, and that purpose can only be accomplished by making it a home for the family.—*Phelan v. Smith*, 100 Cal. 153, 165, 166, 34 Pac. 667. The widow and minor children do not lose their right to a probate homestead when, as administratrix, the mother procured an order of sale of the property, which was never sold under such order.—*Estate of Still*, 117 Cal. 509, 514, 49 Pac. 463. The fact that the wife was separated from her husband before his death, but not permanently, where such separation was caused by his cruel and inhuman treatment, does not prevent her from maintaining an application for a probate homestead out of the property of her deceased husband.—*In re McVay's Estate*, 14 Ida. 56, 64, 93 Pac. 28, 31. And an agreement between husband and wife to live separate and apart, with an allowance to the wife, does not bar her right to a probate homestead from the estate of her deceased husband.—*Eproson v. Wheat*, 53 Cal. 715. In this case, however, the agreement did not divide any property, but merely provided for separation, and that the husband should pay one hundred dollars per annum to the wife during his lifetime; the wife relinquished no right to property; and the setting apart to her of the homestead, after his death, is not in contravention of any expressed or implied term of the agreement. But it is different where both husband and wife enter into a valid agreement, which is binding upon the parties, and the wife thereby absolutely relinquishes her right to select as a homestead, during the husband's life, any part of the property allotted under such agreement to him as his separate estate, and the court has no authority to set apart to her any part of it, after his death, as a probate homestead.—*Wickersham v. Comerford*, 96 Cal. 433, 439, 31 Pac. 358. A devise to the widow does not affect her right to a probate homestead.—*Estate of Firth*, 145 Cal. 236, 238, 78 Pac. 643. A bequest by a husband to his wife, of money, in lieu of the homestead, does not bar her right to a probate homestead, where she has not accepted the bequest.—*Eproson v. Wheat*, 53 Cal. 715, 719. The obtaining of a general judgment lien does not cut off the widow's right to select the land of a deceased husband as a probate homestead at any time before a sale thereof.—*McMillan v. Mau*, 1 Wash. 26, 23 Pac. 441. For other cases concerning this topic, see subdivision 6, ante; and subdivision 25, post. In considering a widow's right to the homestead, it is immaterial whether the fee of the property, during the joint lives of the man and wife, was in one or the other.—*Healy v. Bismark Bank*, 30 N. D. 628, 637, 153 N. W. 392. A widow's title to a homestead can not be successfully attacked because of the homestead's having been carved

out of property specifically devised to her for life.—*Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623.

**14. Widow's right. Limitations on.**—A widow's right to a probate homestead can not be conveyed or waived by her, at least in such a way as to defeat the interests of the minor children.—*Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667. But a valid agreement between a husband and wife for a separation and division of the community property, whereby she relinquishes all right and claim to any part of the share allotted to the husband, deprives her of the right thereafter to select a homestead out of the husband's separate estate, either during his life or after his death.—*Wickersham v. Comerford*, 96 Cal. 433, 439, 31 Pac. 358. And acquiescence for a long period as to certain property selected and set apart as a probate homestead is an estoppel from claiming other property, although there were liens afterward discovered on the lot first set aside.—*Holden v. Pinney*, 6 Cal. 234, 236. The right of a widow to a homestead out of her husband's estate differs from her right to an allowance for her maintenance, in that it looks to the future enjoyment and is made for the purpose of securing to her a place to live during the time she may require it, and the right is lost when she remarries, and if she makes her application after remarriage, it will be denied.—*Estate of Moore*, 170 Cal. 60, 62, 148 Pac. 205.

#### 15. Limited homestead.

(1) **In general.**—These words are used to designate a probate homestead set apart for "a limited period" to the surviving husband or wife. The code of California provides that if no homestead is selected, designated, and recorded, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the husband or wife, out of the common property, and if there be no common property, then out of real estate belonging to the decedent. And there is another provision of said code, that if the probate homestead be selected out of the probate property of the deceased, it must be only for a limited period, and it may be done from any property suitable for the purpose. Section 1468 of the California Code of Civil Procedure, which provides that "if the property set apart be a homestead selected from the separate property of the deceased, the court can set it apart only for a limited period, to be designated in the order, and the title vests in the heirs of the deceased subject to such order," has been held to apply to probate homesteads selected and set apart by the court. The court has a discretion in selecting such a homestead from the separate property of the deceased, but it has no power to set it apart, except for a limited period.—*Estate of Schmidt*, 94 Cal. 334, 340, 29 Pac. 714; *Estate of Lahiff*, 86 Cal. 151, 24 Pac. 850; *Estate of Firth*, 145 Cal. 236, 78 Pac. 643; *Lord v. Lord*, 65 Cal. 84, 87, 3 Pac. 96; *Neary v. Godfrey*, 102 Cal. 338, 341, 36 Pac. 655; *Estate of Burrows*, 136 Cal. 113, 115, 68 Pac. 488; *Warner v. Warner*, 144 Cal. 615, 618, 78 Pac. 24. The right of a survivor to have a probate homestead set apart to him or her out

of the separate estate of the decedent for a limited period is not absolute, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it.—*Estate of Lamb*, 95 Cal. 397, 408, 30 Pac. 568. The right given to the probate court, by the statute, to set apart a homestead "to the family of the decedent" for a limited period, is not controlled, nor in any way affected, by the wife's previous selection of a homestead out of her husband's separate estate without his assent.—*Weinreich v. Hensley*, 121 Cal. 647, 653, 54 Pac. 254. The power given to the court to set apart a homestead that has been selected from the separate estate of the decedent is the same as its power to set aside a homestead when none has been selected in the lifetime of the decedent, and must be exercised in the same manner and under the same limitations and conditions. It is only in the case where there is no common property that the court may select, designate, and set apart a homestead out of the separate estate of the decedent.—*Weinreich v. Hensley*, 121 Cal. 647, 654, 54 Pac. 254. The court has a discretion to exercise in determining whether it will set aside a homestead from the separate property of the decedent, as well as the particular property which it will set aside, and also in determining the time during which it shall be held as a homestead. Section 1468 of the California Code of Civil Procedure clearly indicates that the court must make an order designating the limited period for which the homestead is set apart, and until such order is made there is no homestead.—*Weinreich v. Hensley*, 121 Cal. 647, 655, 54 Pac. 254. The widow's right to a probate homestead is an independent right, which she has, in addition to any other right or property which she may have, and the power of the court to set aside a homestead to her on separate property of the husband which has been devised to others is well established.—*Estate of Huelsman*, 127 Cal. 275, 59 Pac. 776; *Estate of Firth*, 145 Cal. 236, 239, 78 Pac. 643; *Sulzberger v. Sulzberger*, 50 Cal. 385. Our law is liberal to a wife with respect to community property,—that is, property acquired after marriage, by the assumed joint efforts of both spouses,—yet, with regard to the husband's separate property, she has scarcely any right at all. He may devise it all to strangers, and leave her penniless. The old estate of dower is taken away. The right to have a homestead for a limited period given her by the probate court is about the only interest which she can assert in a deceased husband's property.—*Estate of Firth*, 145 Cal. 236, 239, 78 Pac. 643. It is true that by section 1468 of the Code of Civil Procedure of California it is declared, as a general rule of property, that where a probate homestead is selected for a limited period from the separate property of the deceased "the title vests in the heirs of the deceased subject to such order"; but the question as to whom the remainder goes is not before the court on a simple petition for a homestead, and it is error, on such a petition, for the court to determine where the title of the property shall vest upon the termination of the homestead. The adjudication should be confined to the question as to whether the wife



should have the homestead.—*Estate of Firth*, 145 Cal. 236, 240, 78 Pac. 643. The limited period for which a probate homestead may be set apart to the widow out of the separate property of her husband certainly does not extend longer than during her life.—*Hutchinson v. McNally*, 85 Cal. 619, 621, 24 Pac. 1071. Where the wife alone makes a declaration of homestead on separate property of the husband, it does not affect the title of the heirs to the property; but it vests in them subject to the right of the court to set the same aside for a limited period to the surviving wife and children.—*Gruwell v. Seybolt*, 82 Cal. 7, 9, 22 Pac. 938. The court will not refuse to set apart a probate homestead to a widow from the separate property of her deceased husband, though a part of the property was conveyed by her after his death, by a quitclaim deed.—*Estate of Moore*, 57 Cal. 437, 442. Where a widow petitions to have a portion of the estate of her deceased husband set apart to her as a homestead, alleging the property to be his separate estate, the decree setting aside the homestead as prayed, is binding upon her and her heirs, and estops them from asserting that the property belonged to the community (department opinion).—*Estate of Hill*, 167 Cal. 59, 138 Pac. 690. Where no homestead has been selected during the lifetime of the decedent, the court in probate, in setting apart a homestead from the separate property of the decedent, can set it apart for a limited purpose only. Under the provisions of the Code of Civil Procedure, as originally enacted, the power of the court was not so restricted (*Mawson v. Mawson*, 50 Cal. 539). Section 1468 of the Code of Civil Procedure was, however, amended in 1881 (Stats. 1881, p. 8) by the addition of this clause: "If the property set apart be a homestead, selected from separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order." The new clause applies to homesteads set apart in probate proceedings, no homestead having been theretofore selected. Its effect, as to such cases, is to alter the rule declared in *Mawson v. Mawson*, supra, and to take from the court the power to assign a homestead absolutely except where the property set apart is community property.—*In re Niccoll's Estate*, 164 Cal. 368, 129 Pac. 278, 279. Under section 1468 of the California Code of Civil Procedure, as amended in 1861, where no homestead has been selected, the court in setting apart a homestead from the separate property of the decedent can do so for a limited period only.—*Estate of Niccolls*, 164 Cal. 368, 129 Pac. 278. The statute relating to homestead contains nothing whereby a husband may not, by will, provide for setting apart a portion of his separate property as a homestead for the widow and children, for a limited time to be determined by the court; when so set apart the property remains subject to administration.—*Estate of Krieg*, 173 Cal. 721, 161 Pac. 257.

(2) *Dissenting opinions.*—Though a homestead was set aside to a surviving widow, and the order so setting it aside did not limit it to a

life estate in the widow, but set it aside to her absolutely, this, though erroneous, is not void, where the time to appeal from the order had expired and no appeal had been taken, and the order, though erroneous, vests the title in fee in the widow.—*Estate of Huelsman*, 127 Cal. 275, 276, 59 Pac. 776. While the cases of *Estate of Huelsman*, 127 Cal. 275, 276, 59 Pac. 776; *Estate of Moore*, 96 Cal. 522, 531, 31 Pac. 584; and *Fealey v. Fealey*, 104 Cal. 354, 360, 43 Am. St. Rep. 111, 38 Pac. 49, support the proposition stated, in effect, that a title in fee may arise out of a voidable order, yet where an appeal is not taken, and the time for appeal has expired, it can not be said that the case of *Hanley v. Hanley*, 114 Cal. 690, 693, 46 Pac. 736, supports such proposition, although it is cited upon the point in the case of *Estate of Huelsman*, 127 Cal. 275, 276, 59 Pac. 776. Justice Garoutte, in his specially concurring opinion in the last-named case, dissents from the decision on this point, and holds, as would seem to be the reasonable position, that such an order would be void, at least as to any interest beyond a life estate. He says further: "The statute is the measure of the court's power in such a case, and the statute says the property may be set aside for a 'limited period,' and this court has declared that such limited period may not exceed a term for life." Hence, an order that purports to set aside separate property as a homestead in fee is void upon its face, to the extent, at least, of anything beyond a life estate.—*Estate of Huelsman*, 127 Cal. 275, 278, 59 Pac. 776. The same exception to the ruling opinion in *Estate of Moore*, was taken in the concurring opinion of Justice Paterson, who held that where it is conceded that the property out of which the estate was carved was separate property of the deceased, the court had no power to set aside a homestead in fee; and that, the fact being admitted, and shown by the record, no appeal from the order was necessary.—*Estate of Moore*, 96 Cal. 522, 532, 31 Pac. 584.

16. *Surviving husband's right.*—A surviving husband may have set apart to him a probate homestead out of the separate property of the estate of his deceased wife in a proper case. But if, after a homestead has absolutely vested in the surviving husband, he sells it, he is not afterwards entitled to have another homestead set apart to him out of the separate property of his deceased wife.—*Estate of Ackerman*, 80 Cal. 208, 210, 13 Am. St. Rep. 116, 22 Pac. 141. And while he could not have selected a homestead out of his wife's separate property without her consent when living, yet this does not affect the power of the court to set it apart to him, as such, for a limited period after her death; and the power of the court, in this regard, is not defeated by the action of the executor in negotiating a sale which is unconfirmed before the decree is made setting apart the homestead.—*Estate of Lahiff*, 86 Cal. 151, 154, 24 Pac. 850. In such a case the homestead may be taken from any property suitable for the purpose, and if there is no minor child, it is for the surviving husband alone.—*Estate of Lahiff*, 86 Cal. 151, 153, 24 Pac. 850. The surviving husband, upon the administration of the estate of his deceased wife, is entitled to have a

probate homestead out of the community property set apart to him absolutely, where it was declared upon community property, though he had conveyed it to a third person, who subsequently conveyed it to the wife, because the deed of the homestead premises made by the husband alone did not convey any title to the grantee, unless it appeared that it was in trust for the wife, and the grantee's deed to the wife conveyed nothing, even if the husband consented to or directed it.—*Estate of Geary*, 146 Cal. 105, 110, 79 Pac. 855. But the surviving husband's right to have a homestead set off to him for a limited period out of the property of his deceased wife, as "the family of the decedent," is not an absolute right, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it. The right of the surviving husband, in such a case, does not depend upon the fact that there are children or others who may share the use of the homestead.—*Estate of Lamb*, 95 Cal. 397, 408, 30 Pac. 568. A man may, after the death of his wife, declare a homestead in community property and hold it in his own right, or he may sell the property and convey by his own deed the full fee simple title.—*Moyases v. Nyboe*, 90 Wash. 257, 155 Pac. 1036.

#### REFERENCES.

When homestead deemed "otherwise disposed of according to law," within statute providing for its continuance until that time.—See 30 L. R. A. (N. S.) 921.

17. Minor children's right.—The court has power to set apart a probate homestead for minor children who have no living parent, though they are temporarily absent from the state at the hearing of a petition to set apart such homestead for them.—*Estate of Pohlmann*, 2 Cal. App. 360, 84 Pac. 354; *Estate of Still*, 117 Cal. 509, 49 Pac. 463; *Estate of Davis*, 69 Cal. 458, 10 Pac. 671. Premises which are suitable for a homestead may be set apart to them as a probate homestead, although the deceased never resided thereon.—*Estate of Pohlmann*, 2 Cal. App. 360, 84 Pac. 354. Their guardian, or any friend of the minors, may petition for such homestead, because the court has authority to set it apart, either on petition or on its own motion.—*Estate of Pohlmann*, 2 Cal. App. 360, 84 Pac. 354. Those who are not children in fact or by adoption are not entitled to have a homestead set apart to them out of the estate of a decedent.—*Estate of Romero*, 75 Cal. 379, 381, 17 Pac. 434. A minor child loses its right to a probate homestead if application therefor is not made during the minority of the child.—*Estate of Heywood*, 149 Cal. 129, 84 Pac. 834. A probate homestead set apart by the court from community property for the use of the surviving wife and minor children, belongs one-half to the widow and the remainder, in equal shares, to the children; and the shares of the minors, the moment the probate homestead is set apart for the use of the widow and the minor children out of the community property, at once becomes their property, and their several interests therein become part of their

respective estates, to be cared for by their several guardians, and during their minority the children's interests may be sold by their guardians, under proper proceedings for the sale thereof had in the matter of their estates.—*Estate of Hamilton*, 120 Cal. 421, 428, 52 Pac. 708. The widow may mortgage her interest in a probate homestead, but such mortgage is subject to the rights of the children.—*Hoppe v. Hoppe*, 104 Cal. 94, 101, 37 Pac. 894. If a widow dies, leaving a minor child, no arrears of a family allowance due to the widow, or any claim in her favor against the estate, either as administratrix or otherwise, can preclude the setting apart of a probate homestead to such child, after the death of the widow, where no prior order had been made setting apart the homestead.—*Estate of Still*, 117 Cal. 509, 513, 49 Pac. 463. The right of an infant applicant to a homestead out of the estate is independent of, and is not abridged by, the general debts of the estate, or the claims of the administratrix, however just; but neither the widow nor the other children can, individually or collectively, waive the right of an infant child to a homestead.—*Estate of Still*, 117 Cal. 509, 49 Pac. 463, 465. The right to have a probate homestead carved out of the estate is in the nature of a charge upon the estate, from which the widow, under her right of succession, could no more discharge it than she could free the estate from its liability for the debts of her deceased husband. The homestead is, in a proper case, a charge upon the estate of the deceased, created by the law, and is one of the burdens upon the community property, subject to which the surviving wife takes her interest therein equally with the other limitations prescribed by the Civil Code. Pending the administration of a decedent's estate, a minor child is entitled to his right of homestead, although other minors, by reaching their majority, without an application for a homestead having been made by them, or on their behalf, have lost their rights.—*Estate of Still*, 117 Cal. 509, 49 Pac. 463, 465. Rights conferred by probate homestead can not be surrendered by one or more of beneficiaries to detriment of minors.—*Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 Pac. 560.

**18. No money in lieu of homestead.**—There is no authority for the probate court to set apart money to the widow in lieu of a homestead, where there is no property belonging to the estate of the deceased husband out of which a homestead can be set apart to her.—*Estate of Isaacs*, 30 Cal. 105, 113; *Estate of Noah*, 73 Cal. 590, 594, 2 Am. St. Rep. 834, 15 Pac. 290.

**19. Order. Notice. Validity.**—An order setting apart a probate homestead out of community property, ex parte, and without notice, is valid.—*Kearney v. Kearney*, 72 Cal. 591, 595, 15 Pac. 769; *Gaylord v. Place*, 98 Cal. 472, 480, 33 Pac. 484. The proceeding is in rem, and all parties interested are bound by it, without personal notice.—*Hanley v. Hanley*, 114 Cal. 690, 694, 46 Pac. 736; *Kearney v. Kearney*, 72 Cal. 591, 593, 15 Pac. 769. Nor can heirs or devisees claim that they are deprived of

their property without due process of law, because the court, having jurisdiction of the estate of the deceased before distribution, has determined, without notice, to set apart some or all of the estate absolutely to the widow, and that no appeal is allowed from the order. They take the estate subject to that very contingency, and they are not deprived of it in the sense intended by the constitutional inhibition when that contingency occurs.—*Otto v. Long*, 144 Cal. 144, 148, 77 Pac. 885. A failure to file or to enter the order setting apart a probate homestead to the widow, until after she had executed a mortgage thereon, which was foreclosed against her, did not affect the validity of her title, or of the mortgage.—*Otto v. Long*, 144 Cal. 144, 146, 77 Pac. 885. Should it be conceded that the court erred in setting apart absolutely to a widow a homestead out of the separate property of her deceased husband, still it is only an error committed in the exercise of its jurisdiction, and the order is not void. Hence, if no appeal has ever been taken from the order, it is in force; and this being so, the court errs in distributing, as part of the estate, the land so set apart as a homestead. By force of the decree setting it aside, the title to the homestead is, as against the heirs of the deceased, in the parties named in that decree.—*Estate of Moore*, 96 Cal. 522, 531, 32 Pac. 584. The term "family" is synonymous with and represents the surviving wife or husband and children, if any. Hence, when the court, in its decree setting apart a probate homestead for the widow and children, uses the phrase, for the "use of the family" of the deceased, the term "family" expresses the meaning and is used in the sense of the statute, and is, therefore, fully explicit enough to describe the widow and children.—*Phelan v. Smith*, 100 Cal. 159, 170, 34 Pac. 667. The provision in the statute for recording in the recorder's office a homestead out of the decedent's exempt property, for the use of the widow, is manifestly no more than a direction for the preservation of an additional record, to impart notice to third persons, and recording is not essential to the validity of a probate homestead.—*Otto v. Long*, 144 Cal. 144, 77 Pac. 885, 886. In view of the very grave questions which have been raised in regard to the validity of homesteads set apart without notice, it has been suggested in California that probate judges adopt, as a suitable mode of proceeding, the mode found in sections 1474-1486 of the Code of Civil Procedure of that state, so far as applicable; that is, the admeasurement and appraisal of the homestead, the report, the setting of the day for hearing, and the notice as there prescribed.—*Kearney v. Kearney*, 72 Cal. 591, 597, 15 Pac. 769.

**20. Order. Effect of.**—The order setting apart a probate homestead to the widow relieves the property from administration, as it does not then constitute assets of the estate of the deceased, and excludes it from distribution; but it does not affect the title of the homestead.—*Estate of Gilmore*, 81 Cal. 240, 243, 22 Pac. 655; *Dickey v. Gibson*, 121 Cal. 276, 278, 53 Pac. 704; *Estate of Still*, 117 Cal. 509, 513, 49 Pac. 463; *Saddle-mire v. Stockton Sav., etc., Soc.*, 144 Cal. 650, 654, 79 Pac. 381; *Herrold v. Reen*, 58 Cal. 443; *Rich v. Tubbs*, 41 Cal. 34; *Schadt v. Heppe*, 45 Cal.

433; *Estate of Boland*, 43 Cal. 640, 642; *Estate of Hamilton*, 120 Cal. 421, 426, 52 Pac. 708. As the homestead, when set apart, ceases to be a part of the assets of the estate, neither the probate court nor the executor or administrator has any further control over it after it has been so assigned.—*Estate of Orr*, 29 Cal. 101, 104; *Schadt v. Heppe*, 45 Cal. 433, 437; *Estate of Burns*, 54 Cal. 223, 228. The title of the widow, acquired by survivorship, is not affected by a subsequent order of the court setting the property apart to her as a homestead.—*Saddlemire v. Stockton Sav., etc., Soc.*, 144 Cal. 650, 653, 79 Pac. 381. The effect of the homestead order is to remove the premises set apart from the disposition of the will, and to vest title thereto, subject to the order, in the heirs of the deceased, as distinguished from the devisees.—*Estate of Levy*, 141 Cal. 646, 648, 99 Am. St. Rep. 92, 75 Pac. 301. It is error for the probate court to set apart absolutely to the widow and minor children a probate homestead out of the estate of her deceased husband for the "use of the family," though he does not designate that it is for a "limited period." It is only where a homestead is set apart from the separate property of the deceased that it is required to be for a "limited period"; *Phelan v. Smith*, 100 Cal. 158, 170, 34 Pac. 667. The widow, or widow and minor children, as the case may be, take the homestead subject to all valid liens existing against it at the time of the death of the husband, and free from all other claims.—*Estate of Orr*, 29 Cal. 101, 104. The adjudication of claims against a probate homestead is for another forum than the probate court. Hence, a decree of the probate court setting apart a probate homestead subject to the liens of mortgages existing against it is unauthorized.—*Chalmers v. Stockton B. & L. Soc.*, 64 Cal. 77, 78, 28 Pac. 59. The statute requiring the court to set aside a probate homestead does not provide that it shall be set aside clear and free from all encumbrances; nor does it declare that the order setting apart the homestead shall destroy or in any manner impair any lien upon the property. It follows that the setting apart of a homestead does not destroy or impair the lien of a valid mortgage executed by the testator.—*Estate of McCalley*, 50 Cal. 544, 546. Where the property exempt from execution is set apart to the widow and minor children, it is no longer under the control or supervision of the court.—*Bell v. Bell*, 2 Cal. App. 338, 83 Pac. 814. An order setting apart a homestead has no other effect than to withdraw the property from administration, and to that extent relieve the executor or administrator from the necessity of accounting therefor.—*Estate of Klumpke*, 167 Cal. 415, 139 Pac. 1062.

21. **Order. Finality and conclusiveness.**—An order setting apart a homestead for the use of the survivor, or of the survivor and minor children, is appealable; but where the time for an appeal has elapsed, the order becomes final and conclusive upon all matters determined, or which might have been determined, upon the hearing of the matter. Such a judgment is founded in proceedings, not against persons as such, but against or upon the thing or subject-matter itself, whose

status or condition is to be determined, and the judgment, when rendered, is a solemn declaration of the status of the thing, and ipso facto renders it what it declares it to be.—*Kearney v. Kearney*, 72 Cal. 591, 15 Pac. 769; *Gruwell v. Seybolt*, 82 Cal. 7, 10, 22 Pac. 938; *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49; *Hanley v. Hanley*, 114 Cal. 690, 694, 46 Pac. 736. Thus if the question whether the property set apart to the widow as a homestead was or was not community property, is put in issue in the homestead proceedings, that question is concluded by the judgment.—*Fealey v. Fealey*, 104 Cal. 354, 358, 359, 43 Am. St. Rep. 111, 38 Pac. 49. The proceedings being in rem, all persons interested are bound by it, without personal notice.—*Hanley v. Hanley*, 114 Cal. 690, 694, 47 Pac. 736. And a decision, in a probate homestead proceeding, finding and declaring that the applicant is not the widow, is, where such issue of fact is vital to the controversy, and has been tried and determined against the widow, a final determination of fact, which is forever binding in every court between the parties to that litigation and their privies, and becomes the law of the case.—*Estate of Harrington*, 147 Cal. 124, 109 Am. St. Rep. 118, 81 Pac. 546. Order setting apart homestead for decedent's family including widow, made without adverse appearance or contest though conclusive as to property set apart, held not judicial determination of widowhood, binding in all future proceedings.—*In re Hancock's Estate*, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58. Proceedings in probate for the settlement of estates of deceased persons are in the nature of proceedings in rem; and judgments therein, so far as they relate to the disposition of the property of the estate, are binding on the parties interested.—*Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623.

22. Power to encumber or alienate.—The right to a probate homestead is not the subject of sale. It is merely a right to have the court, as a part of the administration of the estate of a decedent, set apart property, and not until such action can it be said that any estate has become vested, either at law or in equity. The right to have a homestead set apart is therefore not estate, either at law or in equity. The estate of homestead is one of a peculiar nature. It is a provision, by the humanity of the law, for a residence for the owner and his family.—*Estate of Moore*, 57 Cal. 437, 444; *Estate of Burton*, 63 Cal. 36, 38. The homestead is set apart "for the use of the family," and "belongs" to the widow and minor children; and is to remain as a homestead, without any power in either of the parties interested to destroy its quality as a homestead until after all of the children have arrived at majority. The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it. It must remain intact until the youngest child has reached majority. Hence it is not competent for either of the other co-tenants to have a partition until that period has been reached.—*Hoppe v. Hoppe*, 104 Cal. 94,

100, 37 Pac. 894. To hold that the widow, or any fewer than all of the parties in interest, can, by a conveyance, defeat the object of the law, would be a fraud upon the rights of those not joining in such conveyance.—*Phelan v. Smith*, 100 Cal. 158, 166, 34 Pac. 667. But the widow, and the children upon attaining majority, may dispose of their respective interests in the homestead, and when all the children have reached majority, the mother and children may have a partition, or may sell the property freed from its homestead character.—*Estate of Hamilton*, 120 Cal. 421, 428, 52 Pac. 708. And where the widow has the right to convey a homestead awarded to her by the probate court, her grantee is vested with the fee, and the right to the use of water appurtenant thereto.—*Bullerdick v. Hermsemeyer*, 32 Mont. 541, 81 Pac. 334, 337. A widow who has no interest in her deceased husband's estate whatever, except to have a probate homestead admeasured to her, and her right as a legatee under his will, is not estopped from claiming a probate homestead out of the land of her deceased husband notwithstanding she had made an agreement assigning her right to receive a legacy from the estate, and making such assignment more secure by conveying her right as heir in case the legacy should fail by the revocation of the will. The will not being revoked, there was not a conveyance by her of any interest in the estate, if her right to a probate homestead out of the estate was not a subject of conveyance.—*Estate of Vance*, 100 Cal. 425, 428, 34 Pac. 1087.

23. **Mortgage lien. Presentation of claims.**—If the widow takes a probate homestead, it is subject to a valid mortgage thereon, and the mortgagee, as before the death of the husband, may subject the land to the satisfaction of the mortgage debt, but his remedy is not in the probate court.—*Estate of Orr*, 29 Cal. 101, 104. The probate court has no power to make a decree declaring that the homestead, as set apart, shall be subject to the liens of mortgages thereon.—*Chalmers v. Stockton B. & L. Soc.*, 64 Cal. 77, 78, 28 Pac. 59. The court has no power to order the executors or administrators to discharge the lien of a mortgage upon a probate homestead, the title to which is vested in fee in the widow, if no claim for the debt has been presented against the estate. The mortgagee's recourse, in such a case, is limited to the mortgaged property.—*Estate of Huelsman*, 127 Cal. 275, 277, 59 Pac. 776. The statute does make a provision for the extinguishment of liens and encumbrances upon a homestead which is selected and recorded prior to the death of one of the spouses, but that statute deals with homesteads declared during the lifetime of the spouses, and the law has not seen fit to make the same provision with respect to probate homesteads.—*Estate of Huelsman*, 127 Cal. 275, 277, 59 Pac. 776. This case, however, holding that there is no provision for paying off liens on a probate homestead, which liens existed at the death of deceased, does not hold that the administrator can not pay off liens on a probate homestead, which they, of their own volition, and contrary to the spirit and intent of the law, have placed there. If the court authorizes a



mortgage upon an estate, including the probate homestead set apart therefrom for the minor children, when it would not have done so if the facts had been called to its attention, and the estate is solvent, land not included in the homestead should first be sold and the proceeds applied to the satisfaction of the mortgage debt, and if the proceeds are sufficient to pay off the mortgage, the homestead claimant is entitled to have the premises free from the encumbrance.—Estate of Shively, 145 Cal. 400, 403, 78 Pac. 869. It is the duty of the court, before the property of an estate is mortgaged, to set apart a homestead from the unencumbered real estate, regardless of the creditors of the estate; but if the court authorizes a portion of the property of a decedent's estate to be mortgaged before setting apart a probate homestead out of that portion thereof, and the proceeds of such mortgage are used in paying debts and expenses of administration, the administrators have the right to apply all of the proceeds of a sale of the mortgaged premises toward payment of the mortgage on the probate homestead. The estate being solvent, the administrators can not be allowed to deprive the minor children of a homestead because the court authorized a mortgage upon it when it would not have done so if the facts had been called to its attention.—Estate of Shively, 145 Cal. 400, 402, 403, 78 Pac. 869. The rule in California which requires a mortgage upon the homestead to be presented to the administrator as a claim is based upon the provisions of section 1475 of the Code of Civil Procedure of that state, but such rule does not apply at all to a probate homestead.—Bank of Woodland v. Stephens, 144 Cal. 659, 663, 664, 79 Pac. 379. If the mortgage is upon a probate homestead set apart by the court for the use of the family, no presentation of the mortgage claim is required.—Browne v. Sweet, 127 Cal. 332, 335, 59 Pac. 774; McGahey v. Forrest, 109 Cal. 63, 68, 41 Pac. 817; Schadt v. Heppe, 45 Cal. 433. Homesteads set apart by order of the court during the pendency of probate proceedings, which had no existence prior to the death of the decedent, are not included in section 1475 of the Code of Civil Procedure of California, but are left to the control of section 1500 of the same code, and a prior lien thereon may be enforced without the necessity of presenting the claim secured thereby to the executor or administrator, provided the holder is willing to expressly waive, in his complaint, and does waive, all recourse to any other property of the estate.—McGahey v. Forrest, 109 Cal. 63, 69, 41 Pac. 817.

#### REFERENCES.

A mortgage placed upon property after it has been set aside as a probate homestead need not be presented against the estate. The claim, in such a case, is not against the estate.—See 19, subd. (2), *supra*.

24. Value.—It is settled that there is no specified limitation of value in the case of a probate homestead, the rule being, that the court may set apart such property as, regardless of its value, in view of

the value and condition of the estate, may seem just and proper, and this is so, whether such homestead has been selected for a limited period or not.—Estate of Levy, 141 Cal. 646, 652, 99 Am. St. Rep. 92, 75 Pac. 301; Estate of Adams, 128 Cal. 380, 57 Pac. 569, 60 Pac. 965; Estate of Walkerly, 81 Cal. 579, 22 Pac. 888; Estate of Smith, 99 Cal. 449, 34 Pac. 77; Estate of Schmidt, 94 Cal. 334, 337, 29 Pac. 714. But it has been held that where an estate is solvent the court must take into account the rights of creditors; and as the legislature has fixed the sum of \$5000 as the limit in value which the debtor may claim for his homestead against the demand of his creditors, "a wise exercise of judicial discretion would limit the homestead to be so set apart to this amount in value in the case of an insolvent estate, where a homestead of this value can be divided from the remainder of the estate, or where the property sought to be set apart is capable of such admeasurement."—Estate of Adams, 128 Cal. 380, 384, 57 Pac. 569, 60 Pac. 965. While the rights of creditors are not to be disregarded in setting apart a homestead, they "are subordinate to the right of the family to a home."—Estate of Adams, 128 Cal. 380, 383, 57 Pac. 569, 60 Pac. 965; and if, in order to set apart such a home, it is necessary to take the entire estate of the deceased, the creditors' rights must yield.—*Keyes v. Cyrus*, 100 Cal. 322, 326, 38 Am. St. Rep. 296, 34 Pac. 722. Heirs, devisees, and legatees occupy, at best, a no more advantageous position than creditors.—*Sulzberger v. Sulzberger*, 50 Cal. 385; Estate of Davis, 69 Cal. 458, 10 Pac. 671; Estate of Lahiff, 86 Cal. 151, 24 Pac. 850. While they have rights which should be considered, the family is first entitled to a home, if there is property capable of being set apart as such; and where the only premises suitable for homestead purposes are indivisible, and no homestead can be given to the family, unless the whole of such premises is given, the fact that such premises are valued at \$17,500, and constitute in value nearly one-half of the estate, does not impair the homestead right, in the absence of a statutory limitation as to value.—Estate of Levy, 141 Cal. 646, 652, 99 Am. St. Rep. 92, 75 Pac. 301. If the only property suitable for homestead purposes is incapable of division, and if it is necessary to set aside the whole of such property, the court may properly set it apart for the most limited period,—the period of administration of the estate,—and may further provide that the family allowance theretofore granted shall cease and determine. The rights of all others interested in the estate will thus be preserved, so far as practicable.—Estate of Levy, 141 Cal. 646, 653, 99 Am. St. Rep. 92, 75 Pac. 301. Although the California code provides a machinery by which creditors may have the homestead declared sold, and the proceeds in excess of \$5000 applied to the payment of debts, this does not affect the "creation" of a homestead upon land in excess of \$5000, upon a contest between the widow and the heirs at law of the decedent. Such provision has nothing to do with the "creation" of a homestead, even when it is established by the parties under the Civil Code; and there are no existing provisions of the

Code which restrain the court from selecting premises as a homestead because they exceed in value \$5000. There were such provisions in sections 1480-1484 of the Code of Civil Procedure of California; but those sections were repealed in 1874.—*Estate of Smith*, 99 Cal. 449, 34 Pac. 77. When a homestead estate is decreed by the county court in a homestead which exceeds \$5000 in value, and is indivisible, the decree should show the amount of the excess in value, and the fact that the property is indivisible.—*Calmer v. Calmer*, 15 N. D. 120, 106 N. W. 684. In the state of Washington, a widow can not claim for herself and her minor children any permanent homestead in premises which were the separate property of the deceased husband at the time of his death. The realty vests in the heirs at law of the decedent, subject to the lawful rights and claims of creditors and all parties interested in the regular course of administration. The law does not prevail in that state, that, no matter how valuable the homestead of the decedent may be, it must go to his widow or children, to the exclusion of the rights of his creditors, as this would have the effect of enlarging the homestead rights of the widow and children by reason of the death of the husband.—*Lloyd v. Lloyd*, 34 Wash. 84, 74 Pac. 1061. The right to declare a homestead depends not upon the acreage of the land, or the number of tracts included, or upon the character of the title, but only on the value, which must not, in California, exceed in value \$5000.—*Bell v. Wilson*, 172 Cal. 123, 126, 155 Pac. 625. A probate homestead is one to be created by the probate court out of real property belonging to the decedent, which was subject to a homestead at the time of the death of the decedent, and which was such as might have been occupied as a home at the time of the decedent's death; the value of such homestead, under the statute of Idaho, is not to exceed \$5000.—*Estate of McVay*, 14 Ida. 56, 65, 93 Pac. 28, 31.

25. **Waiver, loss, and determination of right.**—The acceptance, by a widow, of letters testamentary, and the fact that she was, by the will, constituted one of the residuary legatees, does not tend to show that she waived her right to a homestead as prescribed by the statute.—*Sulzberger v. Sulzberger*, 50 Cal. 385, 388; *Estate of Firth*, 145 Cal. 236, 239, 78 Pac. 643. Nor does she waive her right to a probate homestead by qualifying as executrix under the will.—*Estate of Firth*, 145 Cal. 236, 239, 78 Pac. 643. The homestead, when set apart, is for the benefit of the widow and children, and the widow can not individually, by any act of her own, waive the rights of the children.—*Phelan v. Smith*, 100 Cal. 158, 165, 34 Pac. 667. When minors have reached their majority without an application for a homestead having been made for or on their behalf, their rights are lost; but neither the widow, nor the other children, can, individually or collectively, waive the right of a child who has not attained majority to a probate homestead.—*Estate of Still*, 117 Cal. 509, 49 Pac. 463, 465. If a surviving husband, who has had a homestead set apart to him, afterwards sells the same, he is not entitled to another homestead out of the

separate property of his deceased wife.—*Estate of Ackerman*, 80 Cal. 208, 13 Am. St. Rep. 116, 22 Pac. 141. So if a widow, who is entitled to a homestead, marries before an order of the court setting it apart to her, she loses, by such marriage, her right to the homestead.—*Estate of Boland*, 43 Cal. 640, 642; *Estate of Still*, 117 Cal. 509, 49 Pac. 463. The homestead is set apart "for the use of the family," and "belongs" to the widow and minor children; and is to remain as a homestead without any power in either of the parties interested to destroy its quality as a homestead, until after all of the children have arrived at majority. The homestead is the place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it. It must remain intact until the youngest child has reached its majority. Hence it is not competent for either of the other co-tenants to have a partition until that period has been reached.—*Hoppe v. Hoppe*, 104 Cal. 94, 100, 37 Pac. 894; *Estate of Hamilton*, 120 Cal. 421, 427, 52 Pac. 708. When the children arrive at majority, their interest in the homestead, as a homestead, ceases, for they no longer constitute a part of the family, and whatever rights they thereafter have in the land covered by the homestead are in the nature of those of remaindermen or reversioners.—*Moore v. Hoffman*, 125 Cal. 90, 93, 73 Am. St. Rep. 27, 57 Pac. 769. The widow and minor children do not lose their right to a homestead by the widow's act, as administratrix, in procuring an order of sale of the property, which property was never sold under such order.—*Estate of Still*, 117 Cal. 509, 49 Pac. 463, 465. It is a governing principle that the homestead right continues in favor of any one of the family for whom it was created, as long as he or she asserts it, and remains in a position to assert it; and this principle applies, either where the rights of the minor children are being asserted as against the act of the widow, or where the rights of the widow are being asserted as against the acts of the children. When the children arrive at majority, their interest in the homestead, as a homestead, ceases, and the widow, being the only homestead claimant left, could, of course, dispose of her interest in the land, because there would then be no other homestead claimant to contest her right to do so. But the grantee of a child can not disturb the widow's possession until her homestead right has been extinguished, either by her own act or by operation of law, and it can not be extinguished by the act of any one of the children, either before or after their majority.—*Moore v. Hoffman*, 125 Cal. 90, 93, 73 Am. St. Rep. 27, 57 Pac. 769.

26. Vesting of title.—If no homestead was selected, designated, or recorded in the lifetime of the husband, a decree setting apart a homestead for the use of the family of the decedent vests the title to the homestead in the widow and minor children.—*Hoppe v. Hoppe*, 104 Cal. 94, 100, 37 Pac. 894; *Fealey v. Fealey*, 104 Cal. 354, 360, 43 Am. St. Rep. 111, 38 Pac. 49; *Estate of Gilmore*, 81 Cal. 240, 242, 22 Pac. 655; but upon the death of a spouse, the community property

upon which a homestead exists vests absolutely in the survivor.—*Sheehy v. Miles*, 93 Cal. 288, 295, 28 Pac. 1046; *Dickey v. Gibson*, 113 Cal. 26, 30, 54 Am. St. Rep. 321, 45 Pac. 15; *Vandall v. Teague*, 142 Cal. 471, 474, 76 Pac. 35; *Saddlemire v. Stockton Sav., etc., Soc.*, 144 Cal. 650, 653, 79 Pac. 381; and the probate court has no power to make a decree setting apart the property for the "use of the family"; and the effect of such a decree, if made, no matter how broad its language, is, simply, to take the property out of administration.—*Sheehy v. Miles*, 93 Cal. 288, 295, 28 Pac. 1046. If the homestead, however, was selected while the husband and wife were both alive, out of the separate property of either, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the court to assign it for a limited period to the family of the decedent.—*Mawson v. Mawson*, 50 Cal. 539, 543; *Gruwell v. Seybolt*, 82 Cal. 7, 22 Pac. 938; *Estate of Moore*, 96 Cal. 522, 32 Pac. 584; *Hardwick v. Black*, 128 Cal. 672, 61 Pac. 381; *Estate of Fath*, 132 Cal. 609, 64 Pac. 995. If a probate homestead is set apart to the widow out of community property, and there are no minor children, the title thereto vests absolutely in her.—*Otto v. Long*, 144 Cal. 144, 146, 77 Pac. 885. If the homestead is set apart by the probate court out of the separate estate of the deceased husband, it belongs to the widow and minor children, if there are any.—*Estate of Schmidt*, 94 Cal. 334, 338, 29 Pac. 714; but if there is no minor child or children, one-half vests in the widow and the other half in the child, or in the children in equal proportion.—*Hardwick v. Black*, 128 Cal. 672, 674, 61 Pac. 381, approving *Mawson v. Mawson*, 50 Cal. 539, 542, a case which the court said had not only stood unquestioned for twenty-five years, but had been frequently alluded to in subsequent decisions of the supreme court,—sometimes with approval, and never otherwise. Under a statute prescribing that the homestead may be set apart for a limited period, the period can not be greater than for life, and a decree setting aside a homestead for a specified term of years is on condition that the party live so long, and upon death before the expiration of such period, the homestead vests in the party from whose property it was taken.—*Neary v. Godfrey*, 102 Cal. 338, 341, 36 Pac. 655. When a homestead has been set apart to a surviving spouse and minor children, or if there be no minor children, to the surviving spouse, or if there be no surviving spouse to the minor children, the homestead becomes the absolute property of the persons to whom it was set apart, and the other heirs of the intestate have no interest in or to a homestead so set apart.—*Christianson v. Robinson*, 35 Utah 67, 99 Pac. 459. If there is no community property, at the time the community is dissolved by the death of the husband, but there is separate property of the husband, the widow is entitled to a homestead, for a "limited period," out of such property, the legal title to vest, eventually, in the devisees named in her husband's will.—*Clark v. Baker*, 76 Wash. 110, 118, 135 Pac. 1025. Sections 558 and 1366, Rem. & Bal. Code of the state of

Washington (Rem. 1915 Code, sections 558 and 1366), must be construed in *pari materia*, and, when so construed, it seems clear that the legislature, by section 1366, intended to vest title in the heirs subject to existing laws and to the right of the surviving spouse to assert a homestead out of the property.—*Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659; affirmed in 88 Wash. 700, 153 Pac. 20. If a homestead selected from the community property vests in the survivor on the death of the husband or wife, such vesting depends, not on the mere estimate of the appraisers in the inventory of the estate, but on the fact that the premises selected are of the community property.—*Estate of Bette*, 171 Cal. 583, 153 Pac. 949.

27. *Vacating order. Collateral attack.*—Before making an order setting apart a probate homestead, it is necessary for the court to determine that the facts exist which authorize it to do so, and this determination, when made, can not be inquired into collaterally.—*Otto v. Long*, 144 Cal. 144, 147, 77 Pac. 885; *Saddlemire v. Stockton Sav., etc. Soc.*, 144 Cal. 650, 655, 79 Pac. 381. But if an application is made within six months, to have an order setting apart a homestead vacated on the ground of "inadvertence, surprise, or excusable neglect," such application, upon a proper showing will be granted.—*Levy v. Superior Court*, 139 Cal. 590, 591, 73 Pac. 417; *Cahill v. Superior Court*, 145 Cal. 42, 43, 78 Pac. 467. A creditor of an estate, whose claim against it has not been allowed, is entitled to bring an action in equity to set aside and annul an order setting apart a homestead to the widow of the deceased, upon the ground that it was procured by fraud; and where the complaint charges a wilful suppression of a material truth, and a suggestion of a falsehood by defendant, with intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and avers that such suggestion had the intended effect, to the injury of plaintiff, who was one of such creditors, it charges a fraud.—*Wickersham v. Comerford*, 96 Cal. 433, 435, 439, 31 Pac. 358. But a judgment or decree of a court of competent jurisdiction can be set aside in an independent equitable proceeding for fraud only where the fraud alleged was extrinsic or collateral to the matter which was tried and determined by such court. Wilful and false representations made to the court, in testimony, that the premises involved were community property, and that a declaration of homestead had been filed on the premises while the widow and her husband were actually residing thereon, is not a fraud "extrinsic or collateral" to the matter tried and determined by the court. A decree obtained by perjured testimony is not such fraud.—*Hanley v. Hanley*, 114 Cal. 690, 693, 46 Pac. 736; *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49; *Gruwell v. Seybolt*, 82 Cal. 7, 10, 22 Pac. 938. And where the heirs had notice of the application for a homestead, and the estate has been fully administered, their complaint, in an action to set aside the decree, which fails to show any fraud or device which would prevent proof of the character of the property from which the homestead was selected, does

not show a cause of action.—*Gruwell v. Seybolt*, 82 Cal. 7, 10, 22 Pac. 938. If property selected as a homestead is excessive, and the court has, notwithstanding, set it aside as a homestead, the court's action is subject to appeal but not to collateral attack.—*Estate of Bette*, 171 Cal. 583, 153 Pac. 949.

**28. Exemption of homestead.**—The homestead is exempt from execution or forced sale, whether selected and recorded by the voluntary act of the parties or by an order of the probate court.—*Keyes v. Cyrus*, 100 Cal. 322, 327, 38 Am. St. Rep. 296, 34 Pac. 722; *Estate of Hamilton*, 120 Cal. 421, 429, 52 Pac. 708; *Tyrrell v. Baldwin*, 78 Cal. 470, 475, 21 Pac. 116. Where statutes exist exempting a limited estate for the use of the widow and minor children, and from levy and forced sale under legal process for debts against the decedent, it can not be said that the legislature intended that the expenses of the last sickness, funeral charges, and expense of administration should not be a proper charge against such exempted property.—In *re Thorn's Estate*, 24 Utah 209, 67 Pac. 22. Under the California Tax Act of March 20, 1905, the property of a decedent set apart absolutely as a homestead by the probate court under section 1465 of the Code of Civil Procedure of that state, is not liable to an inheritance tax.—In *re Kennedy's Estate*, 157 Cal. 517, 29 L. R. A. (N. S.) 428, 108 Pac. 280.

**29. Appeal.**—The order setting apart a probate homestead is appealable, but the right to have it reviewed for error is lost by a failure to appeal therefrom.—*Gruwell v. Seybolt*, 82 Cal. 7, 10, 22 Pac. 938. But, while such order is appealable, yet it can not be reviewed on appeal from a subsequent order.—*Estate of Burns*, 54 Cal. 223, 228. The code requires such appeal to be taken within sixty days.—*Estate of Burns*, 54 Cal. 223, 228; *Estate of Burton*, 64 Cal. 428, 1 Pac. 702. And an appeal from a decree denying a widow's application to have a homestead set aside to her out of her deceased husband's estate must be taken within the same time after the decree or judgment is entered.—*Estate of Harland*, 64 Cal. 379, 1 Pac. 159. Both the executor under the will and the devisees and legatees under the will are "parties aggrieved," within the meaning of those words as used in the law relative to the right of appeal. They are therefore entitled to appeal from an order setting apart from the property of the estate of a decedent a homestead for the use of the surviving wife for and during the period of administration of the estate and until its final distribution.—*Estate of Levy*, 141 Cal. 646, 647, 99 Am. St. Rep. 92, 75 Pac. 301. The devisees in such a case are specially aggrieved by the order, for the reason that, under the settled law in this state, the effect of the homestead order is to remove the premises set apart from the disposition of the will, and to vest title thereto, subject to the order in the "heirs" of the deceased as distinguished from the devisees.—*Estate of Levy*, 141 Cal. 646, 647, 99 Am. St. Rep. 92, 75 Pac. 301. If the petition for the setting aside of a probate homestead to the widow is denied, findings should be made, if requested.—*Estate of Burton*, 63

Cal. 36, 37; but not upon immaterial issues.—Estate of Adams, 128 Cal. 380, 388, 57 Pac. 569, 60 Pac. 965. The correctness of the order setting apart a probate homestead out of the separate estate of the decedent is to be determined upon a consideration of the character of the estate at the time of making the application or of the hearing thereon. No benefit that the estate may have derived from the care and provision of the executrix, or any extravagance in the management of the estate, or the amount previously allowed for the support of the family, is an element to be considered in determining the right to have a homestead set apart.—Estate of Adams, 128 Cal. 380, 384, 57 Pac. 569, 60 Pac. 965. An objection not made in proceedings to set apart a homestead can not be heard for the first time on appeal.—Estate of Pohlmann, 2 Cal. App. 360, 84 Pac. 354, 355. In the absence of a statement on appeal from an order setting aside a homestead to the widow and minor children, only errors appearing on the face of the order are properly before the appellate court for determination.—*In re Quinn's Estate*, 27 Nev. 156, 74 Pac. 5. The action of the trial court will not be disturbed on appeal in such cases, unless abuse of discretion is shown.—Estate of Schmidt, 94 Cal. 334, 29 Pac. 714; Estate of Firth, 145 Cal. 236, 78 Pac. 643. The California supreme court's appellate jurisdiction in probate matters extends to no orders or judgments other than those specified in subdivision 3 of section 963 of the Code of Civil Procedure of that state, among which is not an order denying an appellant's motion to be relieved from the consequences of a failure to propose a bill of exceptions within the time allowed.—Estate of Allen, 175 Cal. 356, 165 Cal. 1011. On appeal from an order denying a widow's petition for a decree making the homestead of herself and her deceased husband vest in her as the surviving spouse, if the record does not set forth the evidence given at the trial, the findings of the trial court, that the homestead was abandoned, is sufficient to support the order.—Estate of Allen, 175 Cal. 354, 165 Pac. 1010. The only question to be considered on reviewing the hearing of an application for a probate homestead is whether the court had authority to determine the subject-matter of the controversy, and had jurisdiction over the thing proceeded against; error in the exercise of jurisdiction would not render void the judgment or decree of the court.—*Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623. If a decree is made setting aside a probate homestead to a widow, and there is no appeal taken from such decree within the time allowed therefor, the widow has a fee in the property even though this be in excess of 20 acres in extent, which, at the time of the decree, was not justified by statute.—*Rountree v. Montague*, 30 Cal. App. 170, 157 Pac. 623.

3. Homestead—Appeal from order setting apart.—A notice of appeal from an order setting apart a homestead to the widow of a decedent reading as follows: "Notice is hereby given, pursuant to section 953a, Code of Civil Procedure, to all persons concerned that the undersigned desires to appeal, and does hereby appeal to the supreme court from



the order," etc., is sufficient in substance as a notice of appeal under section 941b of that code. The fact that it is drawn so as to serve the double office of a notice of appeal and a notice to the clerk, under section 953a, does not destroy its effect as a notice of appeal, nor is the statement that it is given "pursuant to section 953a" fatal to its sufficiency as such a notice.—Estate of Faber, 168 Cal. 491, 143 Pac. 737. Subdivision 2 of section 963, of the California Code of Civil Procedure, whereby appeal may be taken from a special order made after final judgment, does not apply to probate proceedings.—Estate of Allen, 175 Cal. 356, 165 Pac. 1011.

## CHAPTER III.

## ALIENATION OF HOMESTEADS OF INSANE PERSONS.

- § 421. Petition for sale or mortgage of.
- § 422. Form. Petition for leave to convey or mortgage homestead of insane person.
- § 423. Notice of application for order.
- § 424. When order may be made, and its effect.
- § 425. Form. Order permitting spouse of insane person to sell or mortgage homestead.
- § 426. Form. Grant of homestead by spouse of insane person.
- § 427. Form. Mortgage of homestead by spouse of insane person.

**§ 421. Petition for sale or mortgage of.**

In case of a homestead, if either the husband or wife becomes hopelessly insane, the husband or wife not insane may petition the superior court of the county in which such homestead is situated for an order permitting the husband or wife, not insane, to sell and convey, or mortgage, such homestead to raise moneys to satisfy a lien or charge thereon, or to provide for the support and care either of the sane or insane spouse, or of their minor children. Such petition must be subscribed and sworn to by the applicant, setting forth the name and age of the insane husband or wife; the number, age, and sex of the children, if any, of such insane husband or wife; a description of the premises constituting the homestead; the value of the same; the county in which it is situated; and such facts, in addition to that of the insanity of the husband or wife, relating to the circumstances and necessities of the applicant and his or her family, as he or she may rely upon in support of the petition.—*Kerr's Cyc. Civ. Code*, § 1269a.

**Note.**—The sale of a homestead in accordance with the provisions of this chapter does not deprive the insane spouse of a vested right in property without his or her consent and without due process of law. *Rider v. Regan*, 114 Cal. 667, 671, 46 Pac. 820.

**§ 422. Form. Petition for leave to convey or mortgage homestead of insane spouse.**

[Title of court.]

[Title of proceeding.]

{ No. —.1 Dept. No. —,  
[Title of form.]

To the Honorable the — Court of the County of —.<sup>2</sup>

The petition of — respectfully shows:

That he is the husband of —,<sup>3</sup> who has become and is hopelessly insane;

That petitioner and his said insane wife<sup>4</sup> are the owners of a homestead interest in the land hereinafter described; that said land was selected, declared, and recorded as a homestead from the community property of said spouses<sup>5</sup> by declaration of homestead recorded in the office of the county recorder of the county of —<sup>6</sup> on or about the — day of —, 19—, in volume — of declarations of homesteads, at page — thereof;

That the name of the insane wife<sup>7</sup> of petitioner is —, and her age is — years;

That the children of said insane spouse are, in number, age, and sex, as follows: —;

That the land constituting said homestead is situated in the county<sup>8</sup> of —, state of —, and is described as follows: —;

That the value of said premises is —;<sup>9</sup>

That your petitioner hereby asks for an order authorizing and permitting him to sell and convey<sup>10</sup> the above-described premises for the reason that his said wife is hopelessly insane, as above stated, and, in addition thereto, —.<sup>11</sup>

Wherefore petitioner prays that an order be made permitting him to sell and convey<sup>12</sup> the above-described land, and for such other order as may be meet.

—, Attorney for Petitioner. —, Petitioner.

Subscribed and sworn to by the petitioner, before me, this — day of —, 19—.

—, Notary Public, etc.<sup>14</sup>

**Explanatory notes.**—1 Give file number. 2 Or, City and County. 3 Or, wife of, giving name of insane spouse. 4 Or, husband. 5 Or, from the separate property of the spouse recording the homestead, etc. 6 Or, city and county. 7 Or, husband. 8 Or, city and county. 9 Give value. 10 Or, mortgage. 11 Give any additional facts relating to the necessities or circumstances of the applicant or family, or the condition of the property, or other reasons for the order. 12 Or, mortgage. 13 Or, other officer taking the oath. *Kerr's Cal. Cyc. Civ. Code*, § 1269b, prescribes the time and manner of giving notice in this proceeding, but does not direct who shall give the notice, nor make any suggestion as to its form.

**§ 423. Notice of application for order.**

Notice of the application for such order must be given by publication of the same, in a newspaper published in the county in which such homestead is situated, if there is a newspaper published therein, once each week for three successive weeks, prior to the hearing of such application, and a copy of such notice must also be personally served upon the nearest male relative of such insane husband or wife, resident in this state, at least three weeks prior to such application; and in case there is no such male relative known to the applicant, a copy of such notice must be so served upon the public administrator of the county in which such homestead is situated; and in such case it is the duty of such public administrator to appear and represent the interests of such insane person. For all such services rendered by the public administrator he must be allowed a reasonable fee, to be fixed by the court, and the same must be taxed as costs against the person making application for the order herein provided for.—*Kerr's Cyc. Civ. Code*, § 1269b.

**§ 424. When order may be made, and its effect.**

If it appears to the court that such husband or wife is hopelessly insane, the court may make an order permitting the husband or wife, not insane, to sell and convey, or mortgage, such homestead, and thereafter any sale, conveyance, or mortgage made in pursuance of such

order is as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, or mortgage. If a sale is ordered it must be reported to and confirmed by the court. Such husband or wife must, before executing any mortgage or conveyance, give a bond, to be approved by the judge of the court, in double the amount of the mortgage, or double the value of the property to be sold, conditioned to account for the proceeds of the mortgage or sale and to apply such proceeds only as the court may direct.—*Kerr's Cyc. Civ. Code*, § 1269a.

**§ 425. Form. Order permitting spouse of insane person to sell or mortgage homestead.**

[Title of court.]

[Title of proceeding.]

{ No. —. 1 Dept. No. —.  
[Title of form.] }

The petition of — for leave to convey<sup>2</sup> the homestead of said petitioner and his<sup>3</sup> insane spouse coming on regularly for hearing, after due notice thereof given as required by law, and it appearing to the court from the evidence adduced that said —,<sup>4</sup> the spouse of said petitioner, is hopelessly insane, and that good cause exists for the making hereof,—

It is hereby ordered, That said petitioner, —, be, and he is hereby, permitted and authorized to sell and convey<sup>5</sup> the homestead property of said spouses, described in the petition herein, which had been selected and recorded as a homestead by instrument recorded about the — day of —, 19—, in volume — of homesteads, at page —, in the office of the county recorder of the county of —,<sup>6</sup> and which is described as follows, to wit: —.<sup>7</sup>

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—1 Give file number. 2 Or, mortgage. 3 Or, her. 4 Name of insane spouse. 5 Or, mortgage. 6 Or, city and county. 7 Give description. If a sale is ordered, it must be reported to and con-

firm by the court, for which proceedings see Kerr's Cal. Cyc. Code Civ. Proc., §§ 1552, 1554, and 1575; and, before executing either mortgage or conveyance, the party executing the same must give bond, to be approved by the judge, in double the amount of the mortgage or double the value of the property, conditioned to account for, and to apply, the proceeds only as the court may direct; but no party is designated in whose favor the bond must be drawn.

**§ 426. Form. Grant of homestead by spouse of insane person.**

This grant, Made this — day of —, 19—, between —, husband <sup>1</sup> of —, the grantor, and —, the grantee herein, witnesseth:

That, whereas the said —, wife <sup>2</sup> of said grantor, is hopelessly insane, and the real estate herein described has been selected and recorded as a homestead; and whereas after proceedings duly had in said matter, an order was duly made and entered in and by the — court of the county <sup>3</sup> of —, on or about the — day of —, 19—, permitting said grantor to sell and convey said real estate, under and in pursuance of which order said grantor has sold said real estate to said grantee,—

Now, therefore, in consideration of the premises, and of the sum of — dollars, receipt of which is hereby acknowledged, said grantor hereby grants to said grantee all that certain lot and parcel of land situate in the county <sup>4</sup> of —, state of —, and described as follows: —.<sup>5</sup>

In witness whereof, The said grantor hereunto sets his hand and seal the day and year first above written.

— [Seal]

Signed, sealed, and delivered in presence of —.

Explanatory notes.—1 Or, wife. 2 Or, husband. 3, 4 Or, city and county. 5 Give description.

**§ 427. Form. Mortgage of homestead by spouse of insane person.**

This mortgage, Made this — day of —, 19—, between —, husband <sup>1</sup> of —, mortgagor, and —, mortgagee, herein, witnesseth:

That, whereas the said —, wife <sup>2</sup> of said mortgagor, is hopelessly insane, and the real estate hereinafter described has been selected and recorded as a homestead; and whereas, after proceedings duly had in said matter, an order was duly made and entered in and by the — court of the county <sup>3</sup> of —, on or about the — day of —, 19—, permitting said mortgagor to mortgage said real estate,—

Now, therefore, in pursuance of the aforesaid order, said mortgagor mortgages to the mortgagee all that certain real estate situate in the county <sup>4</sup> of —, state of —, and described as follows: —,<sup>5</sup> as security for the payment to said mortgagee of a certain promissory note in the words and figures following: —.<sup>6</sup>

In witness whereof, Said mortgagor has hereunto set his hand and seal the day and year first above written.

— [Seal]

Signed, sealed, and delivered in presence of —.

**Explanatory notes.**—<sup>1</sup> Or, wife. <sup>2</sup> Or, husband. <sup>3, 4</sup> Or, city and county. <sup>5</sup> Give description of land. <sup>6</sup> Give copy of promissory note. Insert any other covenants desired, as to insurance, etc.

#### HOMESTEADS OF INSANE PERSONS.

##### In general.

A sale of the homestead, by order of court, where one of the spouses has become insane, and where the petition for such sale failed to allege the value of the homestead to be sold, is void.—*Jones v. Favella*, 126 Cal. 24, 58 Pac. 311, 312. The effect of the insanity of one of the spouses is not to deprive him or her of homestead benefits, or to give to the other spouse any greater interest therein or authority to encumber it than is expressly provided by law.—*Security, etc., Co. v. Kauffman*, 108 Cal. 214, 220, 41 Pac. 467. The joining of the guardian of an insane spouse, under an order of the probate court, with the sane spouse, in a mortgage on the homestead, is not such joint consent as is contemplated by the constitutional provision relating to encumbering or conveying the homestead. Such a mortgage is void.—*Locke v. Redmond*, 59 Kan. 773, 52 Pac. 97, 6 Kan. App. 76, 49 Pac. 670. The mere fact that a wife is involuntarily absent from premises which she had, with her husband, occupied as a homestead with their minor children, as where she has been committed to an asylum for the insane, does not wrest from her her homestead rights

for herself and family.—Curry v. Wilson, 45 Wash. 19, 87 Pac. 1065, 1067. An insane spouse confined in an insane asylum in another state is incapable of giving her free consent to an abandonment of the homestead.—Alton Mer. Co. v. Spindel, 42 Okla. 210, 140 Pac. 1168, 1169.

REFERENCES.

As to alienation of homesteads of insane persons see Henning's General Laws, p. 514. Abandonment of homestead by insane spouse.—See note 3 L. R. A. (N. S.) 515. Crops grown on homestead, or proceeds thereof as exempt, see note 22 L. R. A. (N. S.) 577.



## CHAPTER IV.

## DOWER.

- § 427.1 Widow's dower, use of one-half of husband's lands.
- § 428. When dower may be assigned by county court.
- § 429. Warrant for assignment of dower.
- § 430. Oath of commissioners and return of proceedings.
- § 431. Form. Petition for admeasurement of dower.
- § 432. Form. Order for notice of hearing on petition for dower.
- § 433. Form. Order appointing guardian for minors.
- § 434. Form. Notice of hearing on petition for dower.
- § 435. Form. Order for admeasurement of dower.
- § 436. Form. Warrant to commissioners to admeasure dower.
- § 437. Form. Oath of commissioners to admeasure dower.
- § 438. Form. Return of commissioners to admeasure dower.
- § 439. Form. Order confirming report of commissioners to admeasure dower.
- § 439.1 Estates by the curtesy, how created.

## DOWER AND CURTESY.

- |  |                              |
|--|------------------------------|
| 1. Dower. In general.                          | (2) In Arkansas.             |
| 2. Dower. Inchoate right.                      | (3) In Colorado.             |
| 3. Dower. In trust property, etc.              | (4) In Hawaii.               |
| 4. Dower. Testamentary provision in lieu of.   | (5) In Indian Territory.     |
| 5. Dower. Widow's right prior to assignment.   | (6) In Kansas.               |
| 6. Dower. Purchaser's right before assignment. | (7) In Montana.              |
| 7. Dower. Extinguishment of interest.          | (8) In Oklahoma.             |
| 8. Dower. Power to modify right.               | (9) In Oregon.               |
| 9. Dower. Law governing.                       | (10) In South Dakota.        |
| 10. Dower. Rights of dowress.                  | (11) In Utah.                |
| (1) In Alaska.                                 | 11. Curtesy.                 |
|  | (1) In general.              |
|  | (2) Curtesy. Relinquishment. |
|  | (3) Same. Right to assign.   |
|  | (4) Curtesy consummate.      |

## § 427.1 Widow's dower, use of one-half of husband's lands.

The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-half part of all the land whereof her husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof; provided, however, that any woman entitled to dower, may, at her election, take in lieu of such dower the undivided third part in

her individual right in fee of the whole of the land whereof the husband was seised of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. And provided further, that when a widow shall be entitled to an election under this section, she shall be deemed to have elected to take the undivided third of such lands unless within one year after the death of her husband she shall commence proceedings for the assignment or recovery of her dower.—*L. O. L.*, § 7286; as amended by Laws of 1917, chap. 331, p. 687.

**§ 428. When dower may be assigned by county court.**

When a widow is entitled to dower in the lands of which her husband died seised, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever counties the lands may lie, by the county court of the county in which the estate of the husband is settled, upon application of the widow or any other person interested in the lands; notice of which application shall be given to such heirs, devisees, or other persons, in such manner as the county court shall direct.—*Lord's Oregon Laws*, § 7293.

**ANALOGOUS AND IDENTICAL STATUTES.**

No identical statute found.

Alaska—Compiled Laws of 1913, section 463.

Hawaii—Revised Laws of 1915, sections 2977, 2978, 2983.

Montana—Revised Codes of 1907, sections 7817-7822.

**§ 429. Warrant for assignment of dower.**

For the purpose of assigning such dower, the county court shall direct a warrant to issue to three discreet and disinterested persons, authorizing and requiring them to set off the dower by metes and bounds, when it can be done without injury to the whole estate.—*Lord's Oregon Laws*, § 7294.

## ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 464.

Montana—Revised Codes of 1907, section 7823.

**§ 430. Oath of commissioners and return of proceedings.**

The commissioners shall be sworn by a judge of any court of record or a justice of the peace faithfully to discharge their duties, and shall, as soon as may be, set off the dower according to the command of such warrant, and make return of their doings, with an account of their charges and expenses, in writing, to the county court; and the same being accepted and recorded, and an attested copy thereof filed in the office of the county clerk of the county where the lands are situated, the dower shall remain fixed and certain, unless such confirmation be set aside or reversed; costs on appeal, and one-half of the costs of such proceedings, shall be paid by the widow, and the other half by the adverse party.—*Lord's Oregon Laws*, § 7295.

## ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska—Compiled Laws of 1913, section 465.

Montana—Revised Codes of 1907, section 7824.

**§ 431. Form. Petition for admeasurement of dower.**

[Title of court.]

[Title of proceeding.]

{	No. ——. <sup>1</sup>	Dept. No. —.
	[Title of form.]	

To the Honorable the — Court of the County of —.

The petition of — respectfully shows:

That she is the widow <sup>2</sup> of —, deceased, who died on or about the — day of —, 19—, and the administration of whose estate is now pending herein;

That at the time of the death of said deceased, and during his marriage with petitioner, he was seised of an estate in fee of the following described real estate: —;<sup>3</sup>

That the dower of your petitioner in said land has not been assigned to her, and she is now entitled thereto.

Wherefore petitioner prays that her dower in the above described real estate may be admeasured and assigned to her, and that such other order may be made as may be meet.

Dated —, 19—.

—, Petitioner.

—, Attorney for Petitioner.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> The application may be made by any other person interested in the land, in which case the nature of the interest of the petitioner, as heir or devisee, etc., should be stated, in addition to the dower interest, and the petition otherwise changed to correspond thereto. <sup>3</sup> Give description. Under the Montana statute, "every widow claiming dower may file her complaint in the district court of the proper county, against the parties aforesaid" (heirs, or other person in possession having the next estate of freehold or inheritance), "stating their names, if known, setting forth the nature of her claim, and particularly specifying the lands, tenements, and hereditaments in which she claims dower, and praying that the same may be allowed to her, whereupon the clerk must issue a summons, and the pleadings and proceedings must be as in other cases." See Mont. Code Civ. Proc., § 8072.

**§ 432. Form. Order for notice of hearing on petition for dower.**

[Title of court.]

[Title of proceeding.]

{ No. —. <sup>1</sup> Dept. No. —.  
[Title of form.]

The petition of —, widow of —, deceased, having been filed herein, praying for the admeasurement and assignment of dower to her in certain real estate of said deceased,—

It is ordered, That said petition be, and it is hereby, set for hearing before this court on —,<sup>2</sup> the — day of —, 19—, at — o'clock, — m., at the court-room of said court; that notice of said hearing be given by the clerk of this court, by<sup>3</sup> posting notices thereof in three public places in this county, at least ten days prior to said day of hearing. —, Judge of the — Court.

Dated —, 19—.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Give day of the week.  
<sup>3</sup> Or, mailing notice, postage prepaid, to each of the heirs (and devi-

sees) of said deceased residing in this state, addressed to each at his residence; or, publishing notice in —, a newspaper published in this county.

**§ 433. Form. Order appointing guardian for minors.**

[Title of court.]

[Title of proceeding.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

—, the widow of —, deceased, having filed herein her petition for the assignment of dower to her out of certain real estate belonging to the estate of said deceased, and it appearing to the court that — and — are heirs<sup>2</sup> of said deceased, and are minors without general guardian,—

It is ordered, That — be, and he is hereby, appointed guardian for the above-named minors, solely to appear for and take care of their interests in the premises.<sup>3</sup>

Dated —, 19—. —, Judge of the — Court.

**Explanatory notes.**—<sup>1</sup> Give file number. <sup>2</sup> Or, and devisees; or, parties interested in said estate, or claiming an interest in said land. <sup>3</sup> The statute of Montana provides that "the right of dower of an insane married woman may be sold by her guardian, and the title to the real estate transferred to the purchaser, under the direction of the court or judge, in the same manner and with like effect as the property of any insane person may be sold and transferred." Mont. Code Civ. Proc., § 2974.

**§ 434. Form. Notice of hearing on petition for dower.**

[Title of court.]

[Title of proceeding.]

{ No. —. 1 Dept. No. —.  
[Title of form.]

Notice is hereby given, That —, widow of —, deceased, has filed in the above court her petition for the admeasurement and assignment of dower to her in certain real estate hereinafter described, belonging to the estate of said deceased; and that the hearing on said petition has been set by this court for —,<sup>2</sup> the — day of —, 19—, at — o'clock, — m., at the court-room of this court, at which time and place all heirs,<sup>3</sup> and all persons claiming under them, or any of them, are required

to appear and show cause, if any they have, why said petition should not be granted.

The real estate mentioned in said petition, and sought to be affected by this proceeding, is described as follows:

\_\_\_\_\_.<sup>4</sup>

\_\_\_\_\_. Clerk.

Dated \_\_\_\_\_, 19\_\_\_\_.

Explanatory notes.—1 Give file number. 2 Give day of week. 3 Devises, if any. 4 Give description.

**§ 435. Form. Order for admeasurement of dower.**

[Title of court.]

[Title of proceeding.]

{ No. \_\_\_\_.<sup>1</sup> Dept. No. \_\_\_\_.  
[Title of form.]

The petition of \_\_\_\_\_, widow of \_\_\_\_\_, deceased, praying that dower be admeasured and assigned to her, coming on regularly to be heard this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; and it appearing to the court that due notice of the hearing of said petition has been given to the heirs<sup>2</sup> of said deceased, and to all persons claiming under them, or any of them, as required by law and the order of this court; that said petitioner is the widow of said deceased; that during the marriage of said deceased with his said wife he was seised in fee of the lands hereinafter described; and that petitioner is entitled to dower therein,—

It is ordered, That said petition of said widow, \_\_\_\_\_, for the admeasurement of dower be, and it is hereby, granted; and that a warrant be issued by the clerk of this court to \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, three discreet and disinterested persons, authorizing and requiring them to set off said dower by metes and bounds, if the same can be done without injury to the whole estate; and to make return of their doings to this court, with an account of their charges and expenses as required by law.

The real estate from which said dower is to be set off is described as follows: \_\_\_\_\_.<sup>3</sup>

Dated \_\_\_\_\_, 19\_\_\_\_. \_\_\_\_\_, Judge of the \_\_\_\_\_ Court.

Explanatory notes.—1 Give file number. 2 And devisees, if any. 3 Give description.

**§ 436. Form. Warrant to commissioners to admeasure dower.**

[Title of court.]

[Title of proceeding.]

{ No. —.1 Dept. No. —.  
[Title of form.]

The People of the State of —.

To —, —, and —, Greeting.

Whereas, on the — day of —, 19—, an order was duly made in and by the above-named court, in the above-entitled proceeding, directing the clerk of said court to issue to you a warrant, authorizing and requiring you, as commissioners, to allot and set off to —, as widow of —, deceased, her dower in the real estate of said deceased in said order described, as follows: —,<sup>2</sup>—

Now, therefore, you are, by this warrant, authorized and required to admeasure and set off, by metes and bounds, if it can be done without injury to the whole estate, to said —, widow of said —, deceased, her dower in the premises above described, with all reasonable speed, and thereafter make written return to the court of your doings in that behalf, with an account of your charges and expenses incurred therein.

By order of the — court, this — day of —, 19—.

[Seal]

—, Clerk.

By —, Deputy Clerk.

Explanatory notes.—1 Give file number. 2 Describe the land.

**§ 437. Form. Oath of commissioners to admeasure dower.**

[Title of court.]

[Title of proceeding.]

{ No. —.1 Dept. No. —.  
[Title of form.]State of —,  
County of —, } ss.

—, —, and —, being duly sworn, each for himself, on oath, says that he will faithfully discharge the duties of commissioner to admeasure and set off to —, widow of —, deceased, her dower out of the real estate

of said deceased, in accordance with the requirements of the warrant herein issued to him.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ } Commissioners.

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_, 19\_\_\_\_. \_\_\_\_\_, Judge of the \_\_\_\_ Court.<sup>2</sup>

Explanatory notes.—<sup>1</sup> Give file number. <sup>2</sup> Or, Justice of the Peace. For form of oath of commissioners in Montana, see Mont. Code Civ. Proc., § 3076.

**§ 438. Form. Return of commissioners to admeasure dower.**

[Title of court.]

[Title of proceeding.]

{ No. \_\_\_\_.<sup>1</sup> Dept. No. \_\_\_\_.  
[Title of form.]

The undersigned, commissioners heretofore appointed to admeasure and set off to \_\_\_\_, widow of \_\_\_\_, deceased, her dower in the real estate of said deceased, respectfully report:

That, after receiving the warrant hereto annexed, they took the oath required by law, which is also attached hereto, and thereafter performed the duties required of them as follows:

That they viewed the land described in said warrant, and, being of the opinion that the dower interest of said widow therein could be set off to her without injury to the whole estate, and finding that a survey was necessary therefor, they employed \_\_\_\_, a competent surveyor, and his assistants, and have with their aid admeasured, and the undersigned, as such commissioners, have set off, allotted, and assigned to said \_\_\_\_, widow as aforesaid, as and for her dower interest in said real estate, the following described portion thereof: \_\_\_\_;<sup>2</sup>

That the following is an account of the charges and expenses of said commissioners, incurred by them in the performance of said duties.



Compensation of commissioners, — days each, at  
\$— per day.....\$—  
Compensation of surveyor and — assistants, —  
days, at \$— per day..... —  
Total .....\$—  
All of which is respectfully submitted.

— }  
— } Commissioners.  
— }

Explanatory notes.—1 Give file number. 2 Give description of land set off.

§ 439. Form. Order confirming report of commissioners to admeasure dower.

[Title of court.]

[Title of proceeding.] { No.—.1 Dept. No.—.  
[Title of form.]

The commissioners heretofore appointed to admeasure and set off to —, widow of said —, deceased, her dower in the real estate of said deceased, having filed their report herein, and said report coming on regularly for hearing and action by the court,<sup>2</sup> and it appearing that all requirements of law have been complied with herein, and that said report of the commissioners is fair and just, and should be accepted and confirmed by the court,—

It is ordered, That said report of the commissioners, and the admeasurement and assignment of dower to said —, widow of said deceased, therein contained, be, and the same are hereby, accepted and confirmed by the court.  
Dated —, 19—. —, Judge of the — Court.

Explanatory notes.—1 Give file number. 2 If any opposition be made, insert, "and — having appeared in opposition thereto, and the court having heard the allegations and proofs of the parties."

§ 439.<sup>1</sup> Estates by the curtesy, how created.

The widower of every deceased person shall be entitled, as tenant by the curtesy, to the use, during his natural life, of one-half of all the lands whereof his wife was seised of an estate of inheritance at any time during the marriage, although such husband and wife may not have had issue born alive, unless he is lawfully barred thereof. Provided, however, that any man entitled to curtesy, may, at his election, take in lieu of such curtesy, the undivided third part in his individual right in fee of the whole of the land whereof the wife was seised of an estate of inheritance at any time during the marriage, unless he is lawfully barred thereof. And provided further, that when a widower shall be entitled to an election under this section, he shall be deemed to have elected to take the undivided third of such lands unless within one year after the death of his wife he shall commence proceedings for the assignment or recovery of his curtesy. Estates by the curtesy may be admeasured, assigned, and barred in the same manner that dower may be admeasured, signed, and barred; and, as far as practicable, all other laws of this state applicable to dower shall be applicable in like manner and with like effect, to estates by the curtesy.—*L. O. L.*, § 7315; as amended by Laws of 1917, chap. 331, p. 687.

DOWER AND CURTESY.

- |                                    |                              |
|------------------------------------|------------------------------|
| 1. Dower. In general.              | (2) In Arkansas.             |
| 2. Dower. Inchoate right.          | (3) In Colorado.             |
| 3. Dower. In trust property, etc.  | (4) In Hawaii.               |
| 4. Dower. Testamentary provision   | (5) In Indian Territory.     |
| in lieu of.                        | (6) In Kansas.               |
| 5. Dower. Widow's right prior to   | (7) In Montana.              |
| assignment.                        | (8) In Oklahoma.             |
| 6. Dower. Purchaser's right before | (9) In Oregon.               |
| assignment.                        | (10) In South Dakota.        |
| 7. Dower. Extinguishment of in-    | (11) In Utah.                |
| terest.                            | 11. Curtesy. Relinquishment. |
| 8. Dower. Power to modify right.   | (1) In general.              |
| 9. Dower. Law governing.           | (2) Curtesy. Relinquishment. |
| 10. Dower. Rights of dowress.      | (3) Same. Right to assign.   |
| (1) In Alaska.                     | (4) Curtesy consummate.      |

**Dower and curtesy.**

(1) **Dower.** In general.—By virtue of the marriage, the wife acquires no interest in the personal estate of the husband, but only the real; he can not defeat her right of dower in that.—*Griffith v. Griffith*, 74 Or. 225, 145 Pac. 270.

The right of dower in Utah was abolished in 1872, and remained so abolished until re-established by the Edmunds-Tucker act, in March, 1887; and thereafter dower could only be waived or vested as in said act provided.—*Norton v. Tufts*, 19 Utah 470, 57 Pac. 409. In Montana, a court sitting in probate has no jurisdiction of any matter touching the admeasurement of dower. The jurisdiction upon this subject is conferred upon the court as a court of general jurisdiction, and must be invoked by an independent action. If the court, when exercising its probate jurisdiction, has no power with reference to dower, no order which it may make touching the distribution of property during the course of administration can, of itself, affect the right of dower in any lands to which the right has attached, or any election which the widow has with reference to it. She may bring her action to have her dower allotted to her, notwithstanding the order of distribution makes no mention of her right.—*In re Dahlman's Estate*, 28 Mont. 379, 72 Pac. 750, 751. A circuit judge at chambers has jurisdiction, in the territory of Hawaii, to admeasure dower; but he has no such jurisdiction if the right of dower is denied, even in a case instituted by the widow herself.—*Ahin v. Opele*, 17 Haw. 525, 527. In a suit by a widow to have her dower declared and admeasured, in alleged partnership property held in the name of the surviving partner, if the plaintiff admits in her reply that she has received money in settlement, but alleges fraud by the defendant in procuring this settlement, the fraud, entitling her to rescind the contract, must be proved before she can proceed with her suit.—*Hadley v. Hadley*, 73 Or. 179, 144 Pac. 80. A widow is entitled to dower in the lands of which her husband died seised, and she may continue to occupy these with the children or other heirs; or she may, without having the dower assigned, receive one-half of the rents, issues, and profits of the lands, so long as the heirs and other interested persons do not object.—*Martin v. Fletcher*, 77 Or. 408, 149 Pac. 895. Partnership real estate held in the name of one of the partners is, as to the widow of a deceased partner, equitable estate, of which she is not dowerable.—*Hadley v. Hadley*, 73 Or. 179, 144 Pac. 80. A widow is entitled to dower in the lands of which her husband died seised, and she may continue to occupy these with the children or other heirs; or she may, without having the dower assigned, receive one-half of the rents, issues, and profits of the lands, so long as the heirs and other interested persons do not object.—*Martin v. Fletcher*, 77 Or. 408, 149 Pac. 895. A widow has no dower in an equitable estate in lands; and a partnership interest in lands held in the name of a surviving partner is such an interest.—*Hadley v. Hadley*, 73 Or. 179, 144 Pac. 80. A

mortgage by a married man, on land for which he has not fully paid, given to the grantor on receiving the deed to secure payment of the unpaid balance, is a purchase-money mortgage, and the wife's dower in the land is subject to the right of the mortgagee.—*Temple v. Harrington*, 90 Or. 295, 176 Pac. 430.

## REFERENCES.

Power of legislature to destroy dower.—See note 19 L. R. A. 256. Estimating value of dower right.—See note 5 L. R. A. 521. Assignment of dower.—See notes 39 Am. St. Rep. 25-39, 79 Am. Dec. 600-604.

Widow's right to dower in real estate of deceased partner.—See note 27 L. R. A. 340-354. Dower in homestead; relative rights of wife and children.—See note 56 L. R. A. 67-69. Is a widow's dower right in property allotted to her as a homestead extinguished, or merely in abeyance.—See note 10 L. R. A. (N. S.) 1206, 1207.

2. Dower. Inchoate right.—Dower is merely an inchoate right which may or may not ripen into a vested interest and a wife is not required to stand guard over her husband and apprise those who are about to deal with him of her rights. Neither is she bound or even affected by his representations that he is unmarried unless she knowingly or under peculiar circumstances amounting to knowledge, permits innocent persons to deal with him while in good faith believing that he is what he represents himself to be.—*Hilton v. Sloan*, 37 Utah 359, 108 Pac. 696. The interest of a woman in her husband's real estate, both living at the time, is inchoate and not vested.—*Hamblin v. Marchant*, 104 Kan. 689, 180 Pac. 811. Any inchoate right, in the nature of dower, that a woman may have in property of a partnership, of which her husband is a member, can not be asserted so as to affect a purchase-money mortgage on such property.—*Wherritt v. Davis*, 48 Utah 309, 159 Pac. 534.

3. In trust property, etc.—If a trust has been established in property standing in the name of a husband, his wife has, *prima facie*, no dower; she can have it only by showing a want of notice.—*Huffine v. Lincoln*, 52 Mont. 585, 160 Pac. 820. The rule, that a wife has no dower in trust property or in estates lost by breach of condition, can not be avoided on the theory that the dower right, coming to the wife by virtue of marriage, is an interest acquired by purchase, and therefore not to be prejudiced by a trust of which the wife had no knowledge at the time of the marriage.—*Huffine v. Lincoln*, 52 Mont. 585, 160 Pac. 820.

4. Testamentary provision in lieu of.—In a case where a testator made a provision for the widow in lieu of dower, the widow will, under the statute, be presumed to have taken her dower, given by the law, unless there is evidence of some unequivocal act on her part showing

an election to take the testamentary provision instead.—*Mageon v. Kapiolani Estate*, 22 Haw. 510, 514. The statutory right of a widow to elect to take, in lieu of dower, one-half the real property her husband died seised of, if he has left no descendants, attaches to all such property, unless she has relinquished it in legal form, one such form being her joining her husband in a conveyance other than a mortgage.—*Tyler v. Tyler*, 50 Mont. 65, 144 Pac. 1090. If a man die intestate, leaving a wife but no children or descendants of children, the wife may elect to take, in lieu of dower, one-half of the real property, held by the deceased at his death and remaining after the payment of all just debts and claims against him.—*Tyler v. Tyler*, 50 Mont. 65, 144 Pac. 1090. The acts relied on as constituting an election must be clear, positive, and unequivocal, evincing an intention to elect, and it must be done with full information of all the essential facts and circumstances, as well as of her legal rights.—*Larned v. Larned*, 98 Kan. 328, 158 Pac. 3.

5. *Widow's right prior to assignment.*—Before assignment of dower there is no right to an undivided one-third or any particular part.—*Neal v. Davis*, 53 Or. 423, 101 Pac. 212; *Id.* 99 Pac. 69. Prior to assignment, the widow's right of dower is not an estate in the lands, but a mere chose in action, and is not transferable at law to a person not vested with the fee; it can not be transferred by the widow to any other than the heir at law or person holding the legal title to the land under the husband, so as to vest, in such other person, a right of action therefor, nor enable him to defend against ejectment brought by the administrator or heirs at law; and such a deed executed by her before assignment of dower is not admissible in evidence to establish title or right of possession in her vendee.—*Byrne v. Kernals*, 55 Okla. 637, 155 Pac. 587.

6. *Purchaser's right prior to assignment.*—A purchaser of the dower interest of a widow in the lands of her deceased husband, before the same has been set off to her, can not avail himself of such title or interest in an action of ejectment brought against him by the heirs.—*Byrne v. Kernals*, 55 Okla. 637, 155 Pac. 587.

7. *Extinguishment of interest.*—A woman who has joined her husband in executing a deed, thereby barring her inchoate right of dower, has, after the death of her husband, no right, title, or interest in the property that she can convey.—*Robison v. Hicks*, 76 Or. 19, 146 Pac. 1099.

8. *Dower. Power to modify right.*—Dower is a subject that is entirely within the control of the legislative power until it becomes vested by the death of the husband, and, until vested, the legislature may modify, abrogate, increase, or diminish it at pleasure, at least so far as it affects the wife. The common law respecting dower remained in force all of the time while Utah was a territory, and continued in force after it became a state, except as modified by statutory enact-

ment. The common law as to dower, in Utah, continued in force from 1887 to January 1, 1898.—*Hilton v. Thatcher*, 31 Utah 360, 88 Pac. 20, 21, 22, 23, 24. The legislature has power to change, enlarge, diminish, or abolish the right of a wife in the property of her husband, other than the homestead, at any time before that right becomes vested by his death.—*Hamblin v. Marchant*, 104 Kan. 689, 180 Pac. 811.

9. Dower. Law governing.—The right of dower is governed by the law in force at the time of the death of the husband, while the measure of the right is determined by the law in force at the time of the husband's conveyance, where the wife has not relinquished her right.—*Hilton v. Thatcher*, 31 Utah 360, 88 Pac. 20, 22. The widow takes dower under the statute in force at the time of the death of her husband, and not under that of the date of the entry of a confession of judgment. The assignment of dower, under a statute like that of Oregon, must be made according to the statute in force at the time of the death of the husband, except as against the existing rights of third persons in the lands of the husband, acquired by deed or mortgage, in which the wife did not join, by sheriff's sale during the life of the husband, or by executory contract, in which cases the assignment must be under the law in force at the time of such conveyance, sale, or contract, if, by the later statute, the dower estate is enlarged to the prejudice of such purchaser; the reason for the exemption being that such purchaser has a vested right by reason of his purchase, and the legislature can not enact a law that will impair the obligation of his contract.—*Davidson v. Richardson*, 50 Or. 323, 126 Am. St. Rep. 738, 17 L. R. A. (N. S.) 319, 89 Pac. 742, 743, 91 Pac. 1080. This rule applies to judgment liens obtained prior to the enactment enlarging the dower estate. A judgment lien is not a vested right or interest of a creditor in the land until levy and sale. It is only an incident in the remedy for the collection of the debt, purely a creation of statute, and not of the contract, and consequently is subject to the control of the legislature to modify it by increasing or diminishing, or to abolish it altogether, without violating the creditor's constitutional guaranty that the obligation of his contract shall not be impaired.—*Davidson v. Richardson*, 50 Or. 323, 126 Am. St. Rep. 738, 17 L. R. A. (N. S.) 319, 89 Pac. 742, 743, 91 Pac. 1080. If a testator, having land in states other than that of his domicile, provide for the widow's taking property in such states by way of dower, or other marital right, her taking is controlled by the law of the state where the land is.—*Larned v. Larned*, 98 Kan. 328, 331, 158 Pac. 3.

#### 10. Dower. Rights of dowress.

(1) In Alaska.—Congress changed the law of Alaska relative to dower by enacting the amendment of June 6, 1900, whereby a married woman has no inchoate or other dower interest until her husband's death, and then only in the land whereof her husband dies seised of an estate of inheritance.—*Bechtol v. Bechtol*, 2 Alaska 397.

(2) In Arkansas.—Under the laws of Arkansas, which were in force in the Indian Territory prior to statehood, a surviving widow is entitled to dower in the lands held by her husband for allotment at the time, where such lands are subsequently selected in allotment by an administrator.—*Powell v. Crittenden*, — Okla. —, 156 Pac. 661. The title of the heir is subject to the dower interest of his surviving widow.—*Byrne v. Kernals*, 55 Okla. 637, 155 Pac. 587.

(3) In Colorado.—There is no right to dower in the state of Colorado.—*Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1126.

(4) In Hawaii.—A widow is not entitled to her dower out of her husband's personal estate until after payment of expenses of administration.—*Notley v. Brown*, 16 Haw. 575, 577.

(5) In Indian Territory.—The United States courts for Indian Territory, sitting in probate, were, by act of congress of May 2, 1890, chapter 182, 26 Stats. 81, which extended to and put in force in Indian Territory Mansf. Dig., chapter 53 on "dower," vested with jurisdiction to allot dower in personalty belonging to estates in course of administration therein.—*Burdett v. Burdett*, 26 Okla. 416, 35 L. R. A. (N. S.) 964, 109 Pac. 922.

(6) In Kansas.—In Kansas, a widow is not entitled to a dower interest in lands conveyed by her husband, when she, at the time of the conveyance, was a non-resident of the state.—*Buffington v. Grosvenor*, 46 Kan. 730, 13 L. R. A. 282, 27 Pac. 137, 140. In 1879, a dowress sold and released her right of dower in her deceased husband's land in the state of Illinois to the then owner of the fee; and it was held that, the state having no statute relating thereto, the common-law rule applied, and that the consideration received for such release became the absolute property of the dowress, and did not remain a share of the decedent's estate, of which he had only a life use.—*Williams v. Merriam*, 72 Kan. 312, 83 Pac. 976. In Kansas, where technical dower has been abolished, the term is still used to designate the interest which the widow takes in the estate of her husband.—*Larned v. Larned*, 98 Kan. 328, 334, 158 Pac. 3. The widow's right to dower in the state of Kansas, may be lost by acquiescence, ratification, consent, or estoppel, and also by the statute of limitations, which begins to run from the time when the husband's grantee takes adverse possession of the land.—*French v. Poole*, 83 Kan. 281, 111 Pac. 488.

(7) In Montana.—The Montana statute recognizes the common-law right of dower. At the same time, it extends this right to estates to which it did not attach at the common law, and enlarges the wife's right by the election granted to her under such statute. By this provision she has the absolute right to take in fee, in lieu of the common-law dower, one-half of all the real estate, subject to the payment of debts lawfully due from the estate. This estate falls to her, not as heir, or by will of her husband, but by virtue of her

marital right, and without regard to the law relating to the rights of heirs, or to any will made by the husband. After the wife's right has become fixed by the death of the husband, she can assert it, despite the rights of creditors, heirs, or any other person whomsoever. It is true that when the fee to her portion in lands has vested in her under the right of succession, the dower right in such property is pro tanto merged in the fee; but this in no wise affects her right to dower in the residue of the estate. This descends to the heirs, subject to her rights, and, though she falls within the class of those who, under the statute, are denominated "heirs," this does not affect her rights conferred by other statutes which have no connection whatever with the law of succession. Hence if the husband dies intestate, leaving surviving him his widow, and one or both of his parents, but without children or grandchildren, the widow, although she has participated in the distribution of her husband's estate as an heir, is entitled to one-half of said estate, after the payment of debts, under the statute relating to succession, in addition to her right of dower, or election in lieu thereof. The two rights, though conferred by statute, rest upon different principles, and exist independently of each other; and the right of election given the widow, under the circumstances contemplated by statute, has no connection with the right to take as heir one-half of the residue of the estate, real and personal, after the claims of creditors are satisfied.—*Dahlman v. Dahlman*, 28 Mont. 373, 72 Pac. 748, 749, 750. The express provision of the Montana statute is, that the widow shall be endowed of the third part of all lands wherein her husband was seised of an estate of inheritance at any time during the marriage, including equitable and all other estates in lands of whatever description. This provision is without restriction or limitation. It attaches to all lands falling within the description, unless the wife shall have relinquished her right in legal form. This may be done only by her deed executed and duly acknowledged in conformity with the law, or by the acceptance by her of a devise or bequest under the will of her husband, or by a jointure settled upon her, with her assent, by her husband before the marriage.—*Dahlman v. Dahlman*, 28 Mont. 373, 72 Pac. 748, 749. Under a statute which provides that every devise of land, or any estate therein, by will shall bar the widow's dower in land, etc., a widow, by accepting the provisions made for her by the will of her deceased husband, is estopped and barred from claiming dower in any real estate of which her husband died seised, as well as the lands aliened by him alone in his lifetime.—*Spalding v. Hershfield*, 15 Mont. 253, 39 Pac. 88, 89, 90.

(8) In Oklahoma.—A member of the Five Civilized Tribes, prior to the selection of his allotment, has no devisable interest or title in the lands of such tribes; and, if he makes a will, prior to allotment, and dies prior to its selection, but the administrator does make such selection, the devisee takes no title to the real estate, and the widow of the testator, after the will is probated, is entitled to dower.—*Powell*



v. Crittenden, 57 Okla. 1, 156 Pac. 661. The surviving widow of a deceased member of the Choctaw Tribe of Indians, who died before selecting his allotment, but which was afterwards selected for him by an administrator, is entitled to dower in the lands so selected.—Cook v. Childs, 49 Okla. 321, 152 Pac. 88. The surviving widow of a duly enrolled Seminole citizen who died in 1901, before receiving his allotment, is entitled to dower in the lands thereafter selected.—Wadsworth v. Crump (Okla.), 157 Pac. 713, 716. Policies of insurance issued to insured on his own life, payable to himself, or, at his death to his "executors, administrators, or assigns," where his separate property, the proceeds of which, if not otherwise disposed of by him, go to his executors as part of his estate, subject to the widow's dower, as provided in Mansf. Dig., chapter 53, extended over and in force in Indian Territory at the time of his death.—Burdett v. Burdett, 26 Okla. 416, 35 L. R. A. (N. S.) 964, 109 Pac. 922. The non-citizen widow of an allottee of land of the Creek nation whose husband in June, 1906, is entitled to dower in his estate and until it is assigned to her is entitled to remain and possess the home or house of her late husband, together with the farm thereunto attached, free from all rent.—Hawkins v. Stevens, 21 Okla. 849, 97 Pac. 567.

(9) In Oregon.—The administrator is entitled to the possession of all the property of the deceased, both real and personal, for the purposes of administration; but the county court has power to protect the widow's dower interest in moneys in the hands of such administrator.—Butler v. Smith, 20 Or. 126, 25 Pac. 381. Proceedings for the sale of real property of a deceased husband to pay his debts affect his widow's rights of dower.—Arnold v. Smith, 43 Or. 595, 73 Pac. 336, 337. A widow's absolute right to dower in the lands of which her husband had been seised, although resting in action, is liable in equity for her debts, but the creditors should have the dower actually assigned before it is sold under execution, as the uncertainty existing before assignment would inevitably cause diminution of price which would not occur if the dower was assigned before the sale took place.—Baer v. Ballingall, 37 Or. 416, 61 Pac. 852, 853. A wife's inchoate right of dower attaches to the surplus moneys realized from a sale of the husband's lands upon a decree of foreclosure, and her interest in the funds will be protected against the deceased husband's creditors; but her right can not be litigated in an action to recover the funds in a case to which she is not a party.—Butler v. Smith, 20 Or. 126, 25 Pac. 381.

(10) In South Dakota.—Under the laws of Illinois the surviving wife has a dower interest in the lands of the deceased husband; but where the husband made a will devising to his wife the life use of certain homestead property in Illinois, and also a money legacy payable so long as she remained unmarried, which said devise and legacy were in lieu of dower in her husband's lands, and she had not filed any renunciation of the will, but was sued by her husband in South Dakota

to exclude her from any right, title, or interest to land, in the state last named, conveyed by deed from him to her, she is not estopped to claim title under the deed, which was in force and effect prior to the husband's death and prior to the taking effect of the will.—*Evans v. Hellman*, 37 S. D. 499, 502, 159 N. W. 55. If a man, by agreement with his wife, takes a deed of land in their joint names, the wife's half interest in this land, on her husband's death, is not a right of dower but one under the deed.—*Evans v. Hellman*, 37 S. D. 499, 503, 159 N. W. 55. A woman who, on being sued for divorce, has managed to have her husband amend his complaint so as to modify the charges against her, and to allow her to file a cross-complaint alleging "mild grounds to be agreed upon by counsel," and has managed also to have the property questions settled according to a complete scheme specifically set out, can not, accept the property thereupon given her in settlement and subsequently, on the ground of fraud and collusion in respect to the divorce, claim dower rights in property conveyed by the divorced husband to an outside person.—*Ferry v. Troy Laundry Co.* (Or.), 238 Fed. 867.

(11) In Utah.—That portion of a statute abolishing the estate of dower and curtesy does not cut off the widow's right to an interest in the lands of the husband, alienated by him without his wife's consent prior to the passage of such law, although his death did not occur until many years subsequently to its enactment. The measure of her right in such alienated lands is to be determined by the law in force at the time they were alienated.—*Hilton v. Thatcher*, 31 Utah 360, 88 Pac. 20, 22, 24, 25. The estates of dower and curtesy, as such, were abrogated by statute in Utah in 1898, but the right itself was continued in force as an enlarged estate or interest.—*In re Park's Estate*, 31 Utah 255, 8 L. R. A. (N. S.) 1101, 87 Pac. 900, 902. Prior to 1898, the widow, upon the death of her husband, was entitled to a one-third part of all lands of which he was seised during the marriage, and the extent of such interest was a life estate; but, under a statute enacted at that time, she was, upon the death of her husband, entitled to one-third in value of the lands so owned by him, or in which he had an equitable estate, the same to be set apart to her in fee-simple. This was an enlargement of the widow's interest becoming effective January 1, 1898. Prior to that time her interest terminated, as at common law, at her death. Hence where lands were alienated by the husband before January 1, 1898, and while the widow was entitled to a life estate only, she is not entitled to take the value of her interest in the husband's lands out of his estate, as authorized by the act adopted on said date. No doubt this might be consented to by all who have an interest in the estate, but it can not be accorded as a matter of legal right.—*In re Park's Estate*, 31 Utah 255, 8 L. R. A. (N. S.) 1101, 87 Pac. 900, 902, 903. The dower rights of a wife can not be affected by an attempted sale by her husband without her consent, where the purchaser knows that the vendor is a married man. The

purchaser buys with full knowledge of both the interest fixed by law and of his vendor's legal status. He knows that he can not obtain the interest of a wife without her consent; that such interest is contingent only during the life of her husband; and that, upon his death, it immediately vests in her as a fee-simple estate.—*Free v. Little*, 31 Utah 449, 88 Pac. 407, 411. The act of congress endows the widow, in Utah, with a one-third part of all lands whereof the husband was seised; consequently the widow should have a dower interest, a life estate, to the extent of one-third of all the real estate whereof the husband died seised, and she is further entitled to her rights under the law of succession.—*Knudsen v. Hannberg*, 8 Utah 203, 30 Pac. 749, 752. The homestead right does not attach in favor of the widow or children, unless the estate is insolvent and in debt, or is below the homestead allowance in value, and if it is not, it goes to the heirs at once, under the law of succession, subject to the widow's right of dower.—*Knudsen v. Hannberg*, 8 Utah 203, 30 Pac. 749, 752. A marital separation by mutual agreement, even if followed by adultery, was not sufficient to disendow the wife, under 13 Edward I, until the husband, by offering to take her back, had withdrawn from the contract of separation, and the wife had thereupon refused such offer.—*Norton v. Tufts*, 19 Utah 470, 57 Pac. 409. A widow may, by mere silence, estop herself in pais from claiming dower in her husband's estate. But where a concealment by silence is relied upon for estoppel, the parties against whom estoppel is claimed must have knowledge of the facts and of the action about to be taken.—*Norton v. Tufts*, 19 Utah 470, 57 Pac. 409. The law favors the dower right, and is tenacious in protecting the wife's right in her husband's estate, and the doctrine seems established in the United States, at least, that the mere claim of bona fide or innocent purchasers for value is not ordinarily available as against a widow's claim of dower.—*Hilton v. Sloan*, 37 Utah 359, 108 Pac. 689, 696.

#### 11. Curtesy.

(1) In general.—Before the statehood of Oklahoma, while the law of Arkansas was in force there, the rights of curtesy existed in the Indian Territory.—*Miles v. Miles* (Okla.), 175 Pac. 222. A deed executed by a husband, who succeeded by curtesy to the possession of his wife's allotment on her death, he being a full-blood Indian, was not valid until approved by the Secretary of the Interior.—*Zimmerman v. Holmes*, 59 Okla. 253, 159 Pac. 303. Right of the husband of a Choctaw Indian woman to a life estate by curtesy in lands selected by his wife and patented to her after death.—*Bridges v. Wright*, 56 Okla. 10, 155 Pac. 883. The surviving husband of a deceased full-blood Mississippi Choctaw Indian woman, who was duly enrolled, but who died before receiving patent to her allotment is entitled to curtesy in said lands, under the facts stated in the opinion.—*Morris v. Sweeney* (Okla.), 155 Pac. 537. Under the facts stated in the opinion of this case, the surviving husband of a deceased full-blood Mississippi Choctaw Indian

woman, who was duly enrolled but who died before receiving patent to her allotment, was entitled to curtesy in the land.—*Morris v. Sweeney*, 53 Okla. 163, 155 Pac. 537. A husband, surviving his wife, is not barred from curtesy as the result of having executed a quit-claim deed of the property to his wife during her lifetime, provided the instrument was an ordinary deed of conveyance, containing no clause barring his rights, and there is no testimony offered to prove that it was so made on any agreement for the separation of their property, or in anticipation of a separation between themselves or of a divorce.—*In re McCarty's Estate*, 3 Alaska 242, 253. The husband's estate by curtesy has no existence or recognition in the state of Colorado.—*Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1126. When a testatrix in Colorado wills away from her husband more than one-half of her estate and the husband does not in writing consent to the will, the testatrix dies intestate as to one-half of her estate and the devises and legacies mentioned in her will must abate to the extent of one-half and the husband's children are entitled to one-half of the estate of the testatrix.—*Wolfe v. Mueller*, 46 Colo. 335, 104 Pac. 487, 489. A woman, by contracting to sell land situate in Kansas, in which land her husband has at the time an inchoate right of curtesy, does not, unless her husband joins in the contract, execute an instrument that can be specifically enforced against him, after her death, as to his interest in the property.—*Abbott v. Underwood* (Kan.), 216 Fed. 335, 338, 132 C. C. A. 479. Notwithstanding the provisions of the constitution and laws of the state of Oregon it would seem that in that state a husband is still entitled to an estate by the curtesy in his wife's real estate.—*Runyan v. Winstock*, 55 Or. 202, 104 Pac. 418.

(2) *Curtsey. Relinquishment.*—When a husband or wife owns property in his or her own right, any inchoate right the other may have therein, such as tenant by the curtesy or by dower, can not be the subject of a valid contract between them. Hence a husband and his wife can not enter into a valid contract or agreement at the time a will executed by the wife is made, for the relinquishment or surrender of his curtesy interest in her property, and clothe her with power and authority to dispose of her property by will free from his curtesy interest.—*McCrary v. Biggers*, 46 Or. 465, 114 Am. St. Rep. 882, 81 Pac. 356, 357.

(3) *Same. Right to assign.*—A husband holding his life estate in his deceased wife's lands as tenant by curtesy, may assign the same, to the exclusion of a child, claiming the property as a homestead.—*Miles v. Miles* (Okla.), 175 Pac. 222.

(4) *Curtsey consummate.*—The law of Arkansas in relation to curtesy prevailed in the Indian Territory prior to its admission as a state under the name Oklahoma; it continues to prevail here, so that on the death of the wife, all other requisites existing, the husband becomes vested with a freehold estate known as curtesy consummate.—

*Miles v. Miles* (Okla.), 175 Pac. 222. Under curtesy consummate, as it existed in the state of Arkansas, whatever interest the husband acquired in the lands of his wife by marriage could be swept away by her subsequent conveyance or devise of them.—*Johnson v. Simpson*, 40 Okla. 413, 139 Pac. 129; *Irving v. Diamond*, 40 Okla. 438, 139 Pac. 515; *Pierce v. Ellis*, 51 Okla. 710, 152 Pac. 340. Upon the passage and approval of the act of congress of May 2, 1890, chap. 182, 26 Stats. 94 which extended over and put in force in the Indian Territory the common law of England as adopted by the state of Arkansas, with the proviso excepting Indians and their estates, an act of June 7, 1897, chap. 3, 30 Stats. 83, which provided that such laws should apply to all persons of the Indian Territory, irrespective of race, and by the Curtis act of June 28, 1898, chap. 517, 30 Stats. 495, which provided that the laws of Indian tribes should no longer be enforced, title by curtesy consummate, as it existed in the state of Arkansas, attached in favor of the husband to all lands of which the wife became seized during coverture.—*Johnson v. Simpson*, 40 Okla. 413, 139 Pac. 129; *Irving v. Diamond*, 40 Okla. 438, 139 Pac. 515.















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